Garvey Marine, Inc. *and* International Longshoreman's Association, Local 2038, AFL–CIO. Cases 13–CA–33241, 13–CA–33342, and 13–RC–19061

July 27, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On March 13, 1996, Administrative Law Judge Thomas R. Wilks issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

Suspensions and Discharges of Senff and Bradley

The Respondent has excepted to the judge's conclusions that it suspended and discharged deckhands Karl Senff and Steven Bradley because of their union activities in violation of Section 8(a)(3) and (1). We adopt the judge's findings concerning the discipline and discharges of these employees and his conclusions that the Respondent unlawfully discriminated against them.

The record shows that prior to the Union campaign, the Respondent maintained an extremely tolerant approach to employee discipline. Work rules were enforced primarily through oral warnings by boat captains and pilots. Vice President Todd Hudson admitted that the Respondent was "pretty lenient" with respect to deckhands' tardiness and absenteeism before January 1, 1995.[4] He explained that a good deckhand was a "rare commodity" and therefore would be discharged for such misconduct only if Hudson "got tired of it." On rare occasions, the Respondent had discharged employees for very severe misconduct. For example, the Respondent discharged one employee for threatening a pilot while wielding a knife; three others for an incident of intoxication on a boat, although such intoxication was tolerated in other instances; and other employees for theft of a company car and drug abuse.

In response to the filing of the petition, the Respondent, based on advice of counsel, replaced its policy of relying on oral warnings with a written system of progressive discipline that culminated in discharge. The judge found that the new disciplinary system stood in stark contrast to the Respondent's prior "loose, subjective, erratic practice of selective verbal warnings, comments or supervisory complaints." Moreover, the judge found that the new system, admittedly instituted as a response to the filing of the representation petition, violated Section 8(a)(3) and (1). We adopt these findings.

With respect to the disciplinary actions against Senff and Bradley, the essential facts are undisputed. Senff made the initial contact with the Union in early 1994 and collected authorization cards from other employees throughout that year. Several of the coercive statements and threats made by the Respondent's pilots during the organizing campaign were directed at Senff.[5] For example, Pilot Craig Zeedyk told Senff that if the Respondent found the person responsible for bringing the Union in "they will fire his ass." Pilot Craig Nelson warned Senff to "watch your ass" and that "they are looking to fire you." Nelson and Pilot Alvin Ballard also told Senff that if the Union won the election the deckhands would lose benefits, but if the Union lost they would receive a nine-percent pay increase. Ballard further told Senff that "you are running round with these guys getting the cards, doing all the work," and that "they better do something for you . . . because you're going to need something—Good luck with the Union and your new job."

Almost from the beginning of his employment with the Respondent, Senff demonstrated a persistent pattern of tardiness. Senff expressed and acted on the belief that whenever he was relieved late from his shift, perhaps by 15, 20, or 30 minutes, he was entitled to compensate himself by delaying his arrival for his next shift by the same increment. In some instances, boats had been forced to wait for him or to leave without him as a result of his tardiness.

Senff had been orally reprimanded many times for his high rate of absenteeism and tardiness before the filing of the petition. On one occasion when Senff was late, Dispatcher Joey Wlas, a supervisor, told him not to report back. However, despite Senff's pattern of infractions, Wlas later reconsidered and permitted him to return to duty. The evidence demonstrates that, despite his lack of regard for the timing of his shift, the Respondent viewed him as a good deckhand.

In contrast, after the Respondent implemented its new system of written and progressive discipline, Senff received a succession of written warnings on January 20,

[1] The Respondent also filed a motion to reopen the record for the limited purpose of receiving evidence of employee turnover since the hearing, and the General Counsel filed an opposition to the motion. For the reasons discussed below, we deny the Respondent's motion.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall also modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[4] The petition was filed on January 6, 1995. All dates are 1995 unless otherwise indicated.

[5] The judge found, and we agree, that these statements violated Sec. 8(a)(1).

February 9, and March 20. Each threatened possible discharge, with the March 20 warning specifically threatening discharge for "any further incidents of tardiness." Senff was suspended on April 9 and discharged on April 19 as a result of his tardiness on April 9.

Bradley assisted Senff in soliciting authorization cards during the period immediately before the filing of the petition. Moreover, the Respondent identified Bradley as one of the ringleaders of the organizing effort. In mid-February, when Vice President Hudson attempted to read to Bradley a statement of the Respondent's views concerning the Union, Bradley confirmed his involvement with the Union by stating that he had obtained the signed authorization cards from other employees.

On March 27, approximately 2-1/2 weeks after the election, Bradley received a written reprimand for attempting to covertly tape a conversation with Hudson. The reprimand warned Bradley that he would be subject to further discipline, including discharge, for additional violations of Company rules and policies.[6]

On April 15, Bradley was at the Lemont crew headquarters with Pilots Jeff Barnett and Ralph Guilliams when Barnett informed him that, according to the orders for that night, Bradley was to service the Crawford Station facility alone. The deckhands considered this facility a difficult assignment for a single deckhand because the dock was 12 feet above the water and the task of climbing up on the dock and securing the boat was an arduous and risky undertaking for a deckhand working alone. The deckhands had complained about the assignment among themselves, and shortly after the election Bradley and employee Brock presented a letter to Hudson citing the safety risks at the facility and requesting that two deckhands be assigned. Hudson responded that he lacked sufficient deckhands to assign two employees, but promised that he would do so whenever possible.

When Barnett informed him about his assignment to service the facility alone, Bradley initially stated that he would not perform the work, but then said, "No, I am not going to refuse, I will do it . . . I will just take a spill off the dock, claim a back injury . . . and [Respondent] will have another lawsuit." Barnett asked if Bradley was serious, and Bradley just laughed and walked out.

Later, when Barnett and Guilliams were considering whether Bradley was serious, Pilot David Couch entered the conversation and insisted that they call Hudson or Dispatcher Wendell Hackworth. Hackworth in turn radioed Bradley's boat and ordered Pilot Dale Thomas to suspend Bradley, despite Thomas' protests that Bradley was a good deckhand and Bradley's pleas that he was only joking. Hackworth instructed them to return to the dock, and further directed Barnett to call the sheriff to prevent possible vandalism by Bradley upon his return.[7] Three other boats and their crews were kept at the dock for a period of 45–50 minutes until Bradley's boat had returned and he was escorted off the premises by the sheriff's deputy. According to Bradley's uncontradicted and credited testimony, when Bradley asked if the suspension was the result of his union activities, Hackworth replied, "You are f—g right, you go cry to your ILA buddies and see what they do for you." After Bradley was put off the boat, two other deckhands boarded. Bradley was discharged on May 9, without having returned to work from his suspension.

We agree with the judge that Senff's longstanding pattern of tardiness and Bradley's threat could have justified disciplinary action. We also agree with the judge, however, that the General Counsel established a strong prima facie showing, based on evidence of the Respondent's intense animus; its knowledge that Senff and Bradley had played key roles in the card drive; its intent, repeatedly and openly stated, to discharge Senff and other union advocates because of their support of the Union; the timing of the discharges within weeks after the election and in close proximity to each other; and the contrast between its tradition of leniency prior to the organizing effort and the progressive written system unlawfully imposed during the campaign, that the motivation for the Respondent's decisions to suspend and ultimately discharge Senff and Bradley stemmed not from their misconduct but rather from their activities on behalf of the Union. The judge correctly found that, in view of the prima facie case established by the General Counsel, the Respondent's burden of showing that it would have suspended and discharged these employees in the absence of their union activities was "formidable." As the judge noted, it is not enough for the Respondent to show that justification for its disciplinary action existed. Rather, the Respondent has the burden of establishing that it would have taken disciplinary action against the employees regardless of their union activities. *Greenfield Die & Mfg. Corp.,* 327 NLRB 237 (1998), *Hicks Oils & Hicksgas*, 293 NLRB 84, 85 (1989). We agree with his conclusion that the Respondent failed to meet its burden, and that the suspensions and discharges violated Section 8(a)(3) and (1).

As the judge found, the suspensions and discharges occurred pursuant to the Respondent's unlawfully implemented progressive disciplinary system and therefore were themselves unlawful. Moreover, the Respondent failed to establish any business reason for abandoning its past practice of leniency toward employees Senff and Bradley, whom the Respondent conceded were good deckhands. We recognize that the Respondent gave Senff warnings and an opportunity to correct the problem, and that, even under the new disciplinary policy, it

[6] The administrative law judge found the reprimand unlawful because it was issued under the discriminatorily implemented written disciplinary system.

[7] The judge found such a fear unwarranted.

did not issue a warning on each instance of tardiness. Like the judge, however, we are not persuaded that under the previous approach Senff would have been discharged for tardiness because Hudson would necessarily have become "tired of it."[8]

With regard to Bradley, although his threat to fake an injury was unprecedented, Wendell Hackworth told Bradley directly that his suspension was due to his union activities. This stark declaration of the Respondent's motivation is supported by the circumstances of the Respondent's action. Bradley was suspended and discharged for his statement although Barnett and Guilliams were not certain that his threat was serious, and Couch and Hackworth, who initiated the discipline, had not heard the statement. In addition, Pilot Thomas, who was on board the boat with Bradley, opposed the suspension, and Bradley, who had a pattern of not following through on rash remarks, assured Hackworth that he was joking. Moreover, the Respondent created an atmosphere of high drama surrounding Bradley's suspension, calling back Bradley's boat, holding three other boats at the dock awaiting Bradley's arrival, and summoning a sheriff's officer to escort Bradley from the premises. The Respondent's willingness to incur delays in the scheduled rounds of four boats on this occasion contrasts with the critical importance that the Respondent placed on prompt departures in defending its discharge of Senff for tardiness. Requiring the immediate return of Bradley's boat also contrasts with its earlier handling of an individual characterized by the judge as a "knife-wielding, crazed" deckhand, who was permitted to complete his tour of duty despite the unmistakable danger his conduct posed to the crew and vessel.

Based on all of the above considerations, we adopt the judge's conclusions that the Respondent did not successfully rebut the General Counsel's prima facie showing of discrimination, and that the suspensions and discharges of Senff and Bradley were unlawful.

Gissel Bargaining Order

The General Counsel has excepted to the judge's failure to recommend that the Board issue a *Gissel*[9] bargaining order to remedy the unfair labor practices committed by the Respondent. We have taken great care to consider the evidence in the record and to balance the factors relied on by the judge in not recommending a *Gissel* order as well as those favoring this form of extraordinary relief. We conclude that the circumstances of this case, and particularly the egregiousness of the Respondent's violations, warrant the issuance of a bargaining order.

In *Gissel*, the Supreme Court upheld the Board's use of a remedial order that, despite a union's loss on the tally of ballots, an employer bargain with the union under the following circumstances: where at one time the union had the support of a majority of the bargaining unit, the employer's unfair labor practices have a tendency to undermine the union's majority strength and to impede the election process, and the possibility of erasing the effects of the unlawful conduct and ensuring a fair election is slight, so that the previously expressed employee sentiment is better protected by a bargaining order than by a second election. See also *Davis Supermarkets v. NLRB*, 2 F.3d 1162, 1171 (D.C. Cir. 1993). In determining the propriety of a bargaining order, the Board examines the seriousness of the violations and the pervasive nature of the conduct, considering such factors as the number of employees directly affected by the violations, the size of the unit, the extent of dissemination among employees, and the identity and position of the individuals committing the unfair labor practices. *Holly Farms Corp*., 311 NLRB 273 (1993).

In declining to recommend a bargaining order, the judge noted that the statements he found to constitute violations of Section 8(a)(1) were made by the Respondent's pilots, its first-line supervisors, while the Respondent's higher-level officials and its campaign literature gave employees assurances against reprisals for union activity. The judge also found that most of the unlawful coercion was directed at the four most ardent union supporters, that it did not have the effect of diminishing their enthusiastic activity on the Union's behalf, and that employees who testified for the Respondent stated that they were unaware of the coercive statements. Moreover, the judge reasoned that the offers of reinstatement and the backpay ordered for Senff and Bradley, the two principal union activists whom we have found the Respondent discriminatorily discharged, would provide assurance to employees that they could exercise their free choice in a second election. Contrary to the judge, we find that the Respondent's many instances of unlawful conduct render it extremely unlikely that the effects of this misconduct can be sufficiently eradicated by the Board's traditional remedies so that free choice in a second election can be ensured.

At the outset, we note that the record shows that the Union had the support of a majority of the bargaining unit as of January 6, 1995, when the petition was filed. On that date, the Union had obtained signed authorization cards from approximately 16 of 21 deckhands employed in the unit.

Additionally, we find that the seriousness and number of the Respondent's unfair labor practices warrant a bargaining order. We disagree with the judge's finding that the commission of the unlawful acts by the pilots and the focus on certain particularly active union supporters militate against issuing a bargaining order. As the judge

[8] The judge noted that the Respondent did not explain the circumstances of previous discharges for absenteeism in the record. The attendance records included as exhibits suggest that at least some of the employees were terminated when they stopped reporting for work.

[9] *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).

found, the Respondent explicitly instructed the pilots at the outset of the campaign that they were the representatives of the Respondent with the responsibility of convincing the deckhands to vote against the Union. The Respondent went so far as to require each pilot to sign a form acknowledging his "obligation to speak out against the union." Although the same document informed pilots that they were expected to stay within the limits of the law during the anti-union campaign, the judge found that this warning did not absolve the Respondent of responsibility for the unlawful conduct of the pilots acting on its behalf. Furthermore, even though the Respondent's campaign literature and the pronouncements of its higher-level officials contained assurances of good faith and guarantees against reprisals, several of the threats and promises conveyed to unit employees by pilots were attributed to higher officials, including Vice President Hudson, who manages the Lemont facility, and Dispatcher Wlas. We also recognize that the words and actions of immediate supervisors may in some circumstances leave the strongest impression. As the United States Court of Appeals for the District of Columbia has found:

> A rough and ready point made by a supervisor in overalls, the kind of supervisor who is really more naturally engaged in conversation with the workers, may be far more credible and influential so far as the ordinary worker is concerned than a necessarily more formal, structured, and purposeful statement of a high-ranking executive.[10]

In this case, the force of a supervisor's "rough and ready point" would be augmented by the pilot's added control over the working life of the employees, by virtue of their physical proximity, in many cases both day and night for weeks at a time, on the Respondent's boats.[11] In addition, it is significant that Hudson personally made the decisions to discharge Senff and Bradley, the most public and serious unfair labor practices against the most ardent supporters of the Union.

Similarly, the gravity and impact of the Respondent's unlawful conduct is not diminished by the apparent restriction of the violations to a limited number of union activists, particularly in light of the relatively small size of the unit, nor by the failure of the Respondent's torrent of misconduct to deter these employees from their enthusiastic support of the Union. The judge found that the Respondent violated Section 8(a)(1) over 30 times during the preelection period. The unfair labor practices included such powerful acts of coercion as threats of discharge, loss of jobs, and business closure, all of which the Board deems "hallmark" violations with effects on bargaining unit employees that cannot be underestimated. See *Gerig's Dump Trucking*, 320 NLRB 1017 (1996), enfd. 137 F.3d 936 (7th Cir. 1998). The Respondent's further unlawful conduct ran the gamut of serious 8(a)(1) violations: threats of physical injury, stricter work rules, loss of benefits, and refusal to negotiate with the Union; promises of increased pay and benefits if the Union were not elected; coercive interrogations; and creation of the impression of surveillance of union activities. In addition, the judge found that the Respondent implemented a new written disciplinary practice prior to the election for discriminatory reasons, in violation of Section 8(a)(3) and (1).

Like the hallmark violations involving possible loss of employment, the Respondent's threats of physical harm pointedly illustrate the seriousness of its coercion of employees. The Respondent has not excepted to the judge's finding that Pilot Thomas emphasized to unit employee Brock over a 2-week period how easily a shipboard accident, knocking Brock into the river and crushing him between the boat and the dock, could be arranged. He further threatened to beat up union supporters, frequently mentioned how easy it would be to arrange a fatal accident for a deckhand, and announced that he kept a pistol for anyone who tried to keep him from working during a strike, an eventuality that he claimed would inevitably follow the deckhands' choice of a union. These types of threats demonstrate the force that coercive statements from first-line supervisors can have and undermine the Respondent's defense that its literature and speeches mitigated entirely the effect of the coercive conduct by the pilots. On the contrary, such powerful and dramatic threats of harm to employees, in the same way as threats to close or to discharge employees because of their union support, create precisely the legacy of coercion that en-

[10] *Teamsters v. NLRB*, 435 F.2d 416, 417 (D.C. Cir. 1970), enfg. 174 NLRB 268 (1969). Our dissenting colleague correctly points out that *Teamsters* involved only traditional remedies. The issue of a remedial bargaining order was not raised in that case. Therefore, the case neither detracts from nor supports our colleague's position as to the remedial issue here. We do not cite the case for that purpose. As quoted above, however, in considering the merits of the violation, the court aptly recognized the severe coercive effect of statements by first-line supervisors. We find that the court's assessment applies directly to the many threats and coercive interrogations committed by the pilots in this proceeding. Thus, it is relevant to our evaluation of the gravity of the unfair labor practices as an element in determining the appropriateness of a *Gissel* remedy.

[11] Contrary to our dissenting colleague, there is no inconsistency between our analysis here and the Board's decisions in other cases in which the Board has stressed, in finding a remedial *Gissel* bargaining appropriate, that the unfair labor practices were committed by the highest levels of management. The coercion that can be conveyed in a threat by a high management official has been fully detailed in Board precedent and is not at issue here. See, e.g., *Gerig's Dump Trucking*, 320 NLRB 1017 (1996), enfd. 137 F.3d 936 (7th Cir. 1998). We simply find that, in some circumstances like those presented in this case, the fact that the unlawful statements were made by first-line supervisors, who work most intimately with employees and whose authority to speak for management employees implicitly acknowledge on a daily basis, does not detract from the coercive effect of those statements. See, e.g., *C&T Mfg.*, 233 NLRB 1430 (1977).

dures in the workplace and that the Supreme Court addressed in *Gissel*.

It is also significant that the Respondent did not desist in its unlawful conduct even after the Union lost the election. Instead, the Respondent engaged in two additional hallmark violations of Section 8(a)(3) and (1) by suspending Senff and Bradley, the two principal union supporters, within 6 weeks after the election and within 1 week of each other. Neither employee returned to duty before their discharges were effectuated. Moreover, the suspension of employee Bradley, as described above, was carried out in a manner that would ensure a dramatic and lasting impression on other employees and obviates any argument that other employees would not have been aware of the unlawful conduct and its import. Notably, as late as 10 days before the hearing in this proceeding, the Respondent still persisted in its unlawful coercive conduct, with Pilot Zeedyk telling employee Harper that "all the guys who started the union crap would be fired if they were so much as five minutes late for duty." In discharging Bradley and Senff, the Respondent carried out explicit threats made during the campaign, and it was continuing such threats even after the campaign ended.

Under these circumstances, we agree with the General Counsel that the dissemination of the Respondent's unfair labor practices among bargaining unit employees cannot be reliably ascertained from the testimony of the current employees who were called to testify for the Respondent. As the Supreme Court has observed,

> employees are more likely than not, many months after a card drive and in response to questions from company counsel, to give testimony damaging to the union; particularly where company officials have previously threatened reprisals for union activity in violation of Section 8(a)(1).

Gissel, supra, 395 U.S. at 608. In this case, where the Respondent's hostility toward union activity continued unabated throughout the critical period and after the election, and where the employees could not mistake the implications of the Respondent's show of power over the economic life of activists Bradley and Senff, it is small surprise that some employees demonstrated ostensible willingness to support their employer.[12] We cannot rely on such testimony as a factor outweighing the others in determining whether a bargaining order is appropriate. Moreover, knowledge of these discharges can hardly be characterized as undisseminated. Even if the employee witnesses were in fact unaware of the Respondent's threats and coercive statements, they would certainly know about its discharge of Senff and its public and dramatic discharge of Bradley.

For these reasons, we find that the Respondent's serious and repeated unfair labor practices tended to undermine the Union's majority strength and impede the election process. We further find that, even with the offers of reinstatement and backpay to Bradley and Senff, the Board's traditional remedies are unlikely to eradicate the effects of the Respondent's violations sufficiently to ensure a fair second election. Therefore, we find it appropriate to issue a bargaining order requiring the Respondent to bargain with the Union as the representative of the unit employees.

The Respondent now asserts that a bargaining order would be inappropriate due to turnover in the bargaining unit since the close of the hearing, and seeks to reopen the record for the purpose of presenting evidence on this point. The Respondent states that it still employs only 6 of the 21 deckhands who voted in the election, and 13 of the 26 employed as of the close of the hearing. The Respondent further states that two of the six original voters have been promoted to pilot positions and are therefore no longer in the bargaining unit. Finally, the Respondent asserts that Pilot Jim Hackworth, who committed several of the Respondent's violations of Section 8(a)(1), has left its employ. We deny the Respondent's motion.

The Board traditionally does not consider turnover among bargaining unit employees in determining whether a bargaining order is appropriate, but rather assesses the appropriateness of this remedy based on the situation at the time the unfair labor practices were committed. *Salvation Army Residence*, 293 NLRB 944, 945 (1989), enfd. mem. 923 F.2d 846 (2d Cir. 1990). Otherwise, the employer that has committed unfair labor practices of sufficient gravity to warrant the issuance of a bargaining order would be allowed to benefit from the effects of its wrongdoing. These effects include the delays inherent in the litigation process as well as employee turnover, some of which may occur as a direct result of the unlawful conduct. Thus, the employer would be rewarded for, or at a minimum, relieved of the remedial consequences of, its statutory violations. See *Intersweet, Inc*., 321 NLRB 1 (1996), enfd. 125 F.3d 1064 (7th Cir. 1997). Such a result would permit employers, particularly in businesses like the Respondent's that experience significant turnover in normal circumstances, to disregard the requirements of the Act with impunity, with little expectation of incurring the legal consequences of their violations. In addition, the Board has noted that a bargaining order's impact on employee free choice is limited, because employees remain free to reject their bargaining representative after a reasonable period of time. *Poole Foundry & Machine Co*., 95 NLRB 34, 36 (1951), enfd. 192 F.2d 740, 742 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952).

[12] The Board has similarly found that employees who have signed authorization cards or union petitions may be reluctant to admit such conduct when questioned by their employer's counsel, and has expressed some skepticism about the reliability of the employees' testimony under these circumstances. See, e.g., *Crystal Art Gallery*, 323 NLRB 258 (1997).

Even when turnover is considered, a *Gissel* bargaining order remains an appropriate remedy when the Board finds that traditional alternatives are insufficient. Thus, when an employer, in response to a union organizing campaign, terminated its entire work force and refused to rehire most of the employees who had signed union authorization cards, the court agreed with the Board that the egregious unlawful conduct warranted a bargaining order despite turnover among employees and managers. *Intersweet*, supra, 125 F.3d 1064. In that case, 9 of the 31 employees employed at the time of the mass discharge were still employed at the plant, and the employer had hired 105 new workers. In addition, the official who had ordered the discharge was deceased. The court found that the employer did not demonstrate that employee turnover had eliminated the effects of its violations, noting that the employees would certainly be aware of the unlawful conduct and would have no reason to believe that they were less expendable than their predecessors in the event that they attempted to organize. The court further found that the management of the company had not "meaningfully changed" because the managers who had carried out the instruction to discharge the work force, and whom employees would therefore associate with the unlawful action, remained. Id. at 1069. Similarly, in *Gerig's*, supra, 137 F.3d at 943–944, the court enforced the Board's bargaining order, even though only 5 of 21 unit employees remained, and the company president and general manager at the time of the violations either had left or were no longer involved in management.[13]

In the present case, even accepting, arguendo, the facts asserted by the Respondent concerning employee turnover, we find that the effects of the Respondent's unlawful conduct are not likely to be sufficiently dissipated by turnover to ensure a free second election.[14] Although a significant number of the employees who were employed at the time of the unlawful conduct surrounding the election may have left the facility for reasons related or unrelated to the Respondent's unfair labor practices, others remain who would recall these events. In addition, only one of the numerous supervisors involved in the unlawful conduct has left. We further find that the new employees may well be affected by the continuing influence of the Respondent's past unfair labor practices. As the Fifth Circuit has recognized, "Practices may live on in the lore of the shop and continue to repress employee sentiment long after most, or even all, original participants have departed."[15] In the present case, it is difficult to believe that the impression made by Respondent's barrage of serious unlawful conduct during the period before and after the Board election, and continuing to the time of the hearing, could have dissipated in the minds of those employees who were then employed, and that the virulence of the Respondent's response to the previous election campaign would not restrain employee free choice in a second election. Indeed, as noted above, the Respondent's violations are precisely the types of unfair labor practices that endure in the memories of those employed at the time and are most likely to be described in cautionary tales to later hires.

We further find that the asserted departure from the Respondent's facility of Pilot Hackworth does not diminish the necessity of a bargaining order in this case. Although Hackworth's repeated and serious violations of Section 8(a)(1) undoubtedly had a substantial impact on the bargaining unit, many of the Respondent's other officials at various levels of its management hierarchy participated in violations of Section 8(a)(1) and (3) during and immediately after the election campaign. In addition to Hackworth, four other pilots violated Section 8(a)(1) by threats of discharge; threats to close the facility, layoff employees, and reopen with a new work force; promises of benefit if the Union lost the election and threats of loss of benefits if it won; coercive interrogations; statements creating the impression of surveillance of union activities; and threats of serious physical injury to employees. Moreover, as we have already noted, some of the threats expressed by pilots were attributed to higher officials, including Vice President Hudson, who was also responsible for the unlawful discharges of Senff and Bradley. Thus, although Hackworth may have left the Respondent's employ, these officials remain in supervisory positions. Under these circumstances, we find that there has been no meaningful change in management sufficient to ensure a fair second election. Thus, a bargaining order is the only means of protecting employee rights under the Act. *Intersweet*, supra; *Gerig's*, supra.

As previously noted, the Board generally evaluates the appropriateness of a *Gissel* bargaining order based on the circumstances when the unfair labor practices occur. In some recent cases, however, the Board has considered the passage of time, and particularly the delay of the case at the Board, in declining to issue a bargaining order. See, e.g., *Wallace International de Puerto Rico*, 328 NLRB 29 (1999). In *Wallace*, we found that the employer threatened plant closure if the employees selected the union as their collective-bargaining representative. We concluded that certain extraordinary remedies were

[13] The court contrasted the facts in these cases with other cases in which a *Gissel* order was not enforced based in part on a true change in management. See, e.g., *Impact Industries v. NLRB*, 847 F.2d 379, 383 (7th Cir. 1988) (company was being managed by trustees, and the one individual related to the previous managers who was employed did not participate in management); *Montgomery Ward & Co. v. NLRB*, 904 F.2d 1156, 1160 (7th Cir. 1990) (only 1 of 13 managers involved in violations still employed).

[14] Contrary to our dissenting colleague's assertion, we have not in this case refused to consider the Respondent's representations regarding turnover. Rather, we find that, even when those representations are considered, the circumstances of this case do not warrant a conclusion that a fair second election is possible if only traditional remedies are applied.

[15] *Bandag, Inc*., 583 F.2d 765, 772 (5th Cir. 1978).

necessary in view of the severity of the violation and its effect on employees' exercise of their rights under the Act. However, in view of the delay at the Board following the administrative law judge's August 1995 decision, we concluded that court enforcement of a bargaining order based on this violation, which occurred in June 1994, would be difficult and that "employee rights would be better served by proceeding directly to a second election." Id. at 29.

In contrast to *Wallace*, we conclude that a bargaining order is a necessary element of the remedy in the present case, despite the lapse of time since the Respondent's violations. Initially, we note that somewhat less time has elapsed in this case: the violations occurred in January through July 1995, and the judge's decision issued in March 1996. Such a delay, though regrettable, has been found not excessive in prior cases. In *Intersweet,* supra, the Seventh Circuit enforced the Board's *Gissel* bargaining order even though just over 3 years had elapsed between the unfair labor practices and the imposition of the order. The court accepted the Board's determination that the passage of time would not have erased the residual effect of the violations at the plant, and found that a period of 3 to 4 years is an "ordinary institutional time lapse . . . inherent in the legal process." 125 F.3d at 1068, quoting *America's Best Quality Coatings Corp. v. NLRB*, 44 F.3d 516, 522 (7th Cir.), cert. denied 515 U.S. 1158 (1995). The court noted that cases in which it had denied enforcement of bargaining orders involved significantly longer lapses of time, with substantial portions of the delay attributable to the Board. See, e.g., *Montgomery Ward*, supra, 904 F.2d at 1156, 1160 (8 years between violations and order, including 6 years at the Board); *Impact Industries*, supra, 847 F.2d 379, 381 (7-1/2 years between violations and order, including 5-1/2 years at the Board); *NLRB v. Thill, Inc*., 980 F.2d 1137, 1138 (7th Cir. 1992) (over 9 years between violations and order, including 7 years at the Board). Although we recognize that this case has been delayed at the Board, the delay, as well as the total lapse of time since the unfair labor practices, does not approach the time found to render the *Gissel* orders stale in those cases.

More importantly, the extent and severity of the violations in this case, including over 30 serious violations of Section 8(a)(1) and 3 violations of Section 8(a)(3), surpass even the hallmark violation found in *Wallace.* Under these circumstances, we conclude that the Respondent's unfair labor practices cannot be adequately remedied by the Board's traditional remedies or by more limited special remedies like those ordered in *Wallace*. Rather, we find that the circumstances of this case fully warrant the issuance of a bargaining order as a necessary and appropriate means of effectuating the policies of the Act.

We therefore shall modify the judge's recommended Order and order the Respondent to bargain, on request, with the Union as the exclusive collective-bargaining representative of unit employees.

ORDER

The National Labor Relations Board orders that the Respondent, Garvey Marine, Inc., Lemont, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with physical injury, discharge, loss of jobs, closure of business, stricter work rules, loss of 401(k) savings plan, health insurance, travel pay, safety and other work equipment or benefits if the International Longshoreman's Association, Local 2038, AFL–CIO or any other labor organization is designated by them to be their bargaining agent.

(b) Threatening employees with a refusal to negotiate with the Union or any other union and that a strike by it will be inevitable if they designate it as their bargaining agent and that such designation and efforts to obtain it are futile.

(c) Coercively interrogating employees about their sympathies for or activities on behalf of the Union or any other union.

(d) Giving the impression to its employees that their union or other concerted activities protected by the Act are under its surveillance.

(e) Promising its employees a pay increase, better and lower-cost health insurance benefits, more overtime compensation, or other benefits if they refuse to designate the Union or any other union as their collective-bargaining representative.

(f) Implementing a progressive written warning practice for all employees because some employees have engaged in activities on behalf of the Union.

(g) Suspending and discharging employees because of their union sympathies and activities on behalf of the Union or any other union or because of any other concerted activities protected by the Act.

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unlawful discriminatory progressive written warning practice implemented in January 1995, and expunge from its records all warnings issued thereunder to any employee, including warnings issued to William Vaughn, Jeff Grossman, Steven Bradley, and Karl Senff, and reinstate its pre-January 1995 verbal warning practice.

(b) Within 14 days from the date of this Order, offer Steven Bradley and Karl Senff full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Steven Bradley and Karl Senff whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All deckhands employed at the Employer's Lemont, Illinois facility, excluding clerical employees, land-based engineers and maintenance employees, guards, professional employees, captains, pilots and other supervisors as defined by the Act.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Lemont, Illinois copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 16, 1995.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[16] "If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER HURTGEN, dissenting.

I agree with the judge's conclusion that a *Gissel* bargaining order is not warranted.

As my colleagues correctly note, a *Gissel* bargaining order is an "extraordinary" remedy. The much-preferred route is to provide traditional remedies for the unfair labor practices and to hold an election once the atmosphere has been cleansed by those remedies. The *Gissel* (nonelection) route is to be used only in circumstances where it is unlikely that the atmosphere can be cleansed by traditional remedies. The General Counsel has the burden of showing this "extraordinary" circumstance. In the instant case, the judge has found that this showing has not been made. I agree. My reasons are set forth below.

In the first place, I note that the 8(a)(1) violations were committed by first-line supervisors, not higher management officials. Indeed, the higher-level officials reassured employees that there would be no reprisals for union activity. Concededly, these reassurances do not absolve Respondent of its 8(a)(1) liability. However, the issue here is the *Gissel* issue, i.e., whether the 8(a)(1) conduct by the supervisors can be rectified by traditional remedies.[1] I believe that a Board order and court decree against Respondent, plus a notice posted by Respondent, would rectify the 8(a)(1) violations. The employees would understand that Respondent (faced with possible contempt proceedings) would not tolerate 8(a)(1) conduct by its supervisors. I also note that Jim Hackworth, a supervisor who committed multiple 8(a)(1) violations, is no longer employed by Respondent.[2]

In addition, I note that most of the 8(a)(1) conduct was directed to discriminatees Senff, Bradley, and Brock.[3] These three employees continued to be openly aggressive in their union activities, even after the 8(a)(1) conduct was directed to them. Further, there is no evidence of dissemination to others. Indeed, the fact that employees worked on separate boats would tend to minimize any dissemination.

Concededly, the 8(a)(3) violations represented the decisions of higher officials. However, the Board's reinstatement and backpay order will permit the discriminatees to resume their union activity. As noted above, their enthusiasm for the union was not diminished by the

[1] *Teamsters v. NLRB*, 435 F.2d 416, 417 (D.C. Cir. 1970), cited by my colleagues has nothing whatever to do with the issue of whether a *Gissel* order is warranted. It simply holds that the statements by the low-level supervisors were unlawful under Sec. 8(a)(1). My colleagues even concede that the case does not detract from my position. Indeed, the case supports my position. Only traditional remedies were involved in that case.

[2] In justifying a *Gissel* order, my colleagues stress the fact that first line supervisors committed many of the violations Interestingly, in *Bonham Heating*, 328 NLRB No. 61 (1999), my colleagues justified the *Gissel* order by stressing the fact that the conduct was committed by "the highest levels of management."

[3] There were about 21 employees in the unit.

8(a)(1) conduct. Obviously, the 8(a)(3) terminations did bring a halt to their activity. However, as noted, these employees will now be reinstated with backpay.

Further, I note that only 4 of the 21 original unit employees remain as unit employees. As discussed above, the issue is whether a fair election can now be held after traditional remedies are imposed. Traditionally, the Board refuses to consider this evidence. In my view, although such evidence is not dispositive, it is clearly a relevant factor in determining whether a fair election can be held. That is, if 17 of 21 employees were not even employed at the time of the unlawful conduct, that fact should not be ignored in determining whether a fair election can be held.[4]

Finally, I note that the violations occurred in July 1995. Thus, it has been 4 years since those events. Again, while this fact is not dispositive, it is a factor militating in favor of a fair election against a bargaining order.[5]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten employees with physical injury, discharge, loss of jobs, closure of business, stricter work rules, loss of 401(k) savings plan, health insurance, travel pay, safety and other work equipment, or benefits if the International Longshoreman's Association, Local 2038, AFL–CIO or any other labor organization is designated by them to be their bargaining agent.

WE WILL NOT threaten employees with a refusal to negotiate with the Union or any other union and that a strike by it will be inevitable if they designate it as their bargaining agent and that such designation and efforts to obtain it are futile.

WE WILL NOT coercively interrogate employees about their sympathies for or activities on behalf of the Union or any other union.

WE WILL NOT give the impression to our employees that their union or other concerted activities protected by the Act are under our surveillance.

WE WILL NOT promise our employees a pay increase, better and lower-cost health insurance benefits, more overtime compensation or other benefits if they refuse to designate the Union or any other union as their collective-bargaining representative.

WE WILL NOT implement a progressive written warning practice for all employees because some employees have engaged in activities on behalf of the Union.

WE WILL NOT suspend and discharge employees because of their union sympathies and activities on behalf of the Union or any other union or because of any other concerted activities protected by the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the unlawful discriminatory progressive written warning practice implemented in January 1995, and expunge from our records all warnings issued thereunder to any employee, including warnings issued to William Vaughn, Jeff Grossman, Steven Bradley, and Karl Senff, and reinstate our pre-January 1995 verbal warning practice.

WE WILL, within 14 days from the date of the Board's Order, offer Steven Bradley and Karl Senff full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Steven Bradley and Karl Senff whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Steven Bradley and Karl Senff, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All deckhands employed at the Employer's Lemont, Illinois facility, excluding clerical employees, land-based engineers and maintenance employees, guards, professional employees, captains, pilots and other supervisors as defined by the Act.

GARVEY MARINE, INC.

[4] My colleagues say that the Board "traditionally does not consider turnover" in determining whether a *Gissel* order is warranted. However, in a footnote they say that they have considered "in this case" the factor of turnover in determining whether a *Gissel* order is warranted. It is not clear that they have in fact done so. For example, they speculate that the current employees "may well be affected" by the prior unfair labor practices. This very language shows the obvious. There is no *record evidence* that the current employees have in fact been affected. Indeed, given the fact that 17 of the 21 employees were not even present at the time of the unfair labor practices, this speculation is no substitute for hard evidence.

[5] This delay cannot be blamed on Respondent. The administrative law judge's decision issued in March 1996. Thus, the case has been before the Board for more than 3 years.

Sheryl Sternberg, Esq. and *Mary F. Herrnann, Esq*., for the General Counsel.
Alex V. Barbour, Esq. and *Tom Wilde, Esq. (Jenner & Block),* of Chicago, Illinois, for the Respondent.
Fred W. Grady, Esq., of Valparaiso, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. Pursuant to a petition filed by International Longshoreman's Association, Local 2038, AFL–CIO, on January 6, 1995, and a stipulated election agreement approved on February 6, 1995, a secret-ballot election was conducted on March 8 and 9, 1995, under the direction and supervision of the Regional Director for Region 13 of the National Labor Relations Board in the following unit of employees:

> All deckhands employed at the Employer's Lemont, Illinois facility, excluding clerical employees, land-based engineers and maintenance employees, guards, professional employees, captains, pilots and other supervisors as defined by the Act.

The results of the election were as follows:

Approximate number of eligible voters.	22
Void ballots	0
Votes cast for Petitioner.	8
Votes cast against participating labor organization	10
Valid votes counted.	18
Challenged ballots.	3
Valid votes counted plus challenged ballots.	21

Challenged ballots were sufficient in number to affect the results of the election.

The ballot of Jeff Barnett was challenged by the Petitioner on the basis that he is a pilot and therefore excluded from the unit. The Employer contends that he was not employed as a pilot but rather as a deck hand. The ballot of Terry Rutledge was challenged by the Petitioner on the basis that the was not employed on the payroll eligibility date (January 29, 1995). The ballot of Jerome Estes was challenged by the Board agent because his name was not on the eligibility list.

On March 16, 1995, the Petitioner filed the following timely Objections to Conduct Affecting the Results of the Election:

> 1. Promises and threats were made by management through supervisory personnel to listed members of the designated bargaining unit as part of its pre-election campaign during and outside of their employment hours for raises, overtime pay, increased size of work units and insurance coverage if the union failed to win the election.
>
> 2. The employer utilized supervisory personnel and company owned transportation for purposes of expending funds to purchase food and drinks for deck hands for purposes of improperly coercing, interfering, and influencing their votes.
>
> 3. The employer provided extending funding for deck hands transportation to and from the job site.
>
> 4. The employer improperly discharged Captain Timothy T. Eaker for his support of the Union and in order to coerce support from supervisory personnel for the company.

The unfair labor practice charge in Case 13–CA–33241 was filed by the Union on March 16, 1995, and amended on March 29, 1995. The unfair labor practice charge in Case 13–CA–33342 was filed by the Union against Respondent on April 21, 1995, and amended on May 4, 1995, and on May 31, 1995.

The Regional Director for Region 13 of the National Labor Relations Board issued an order consolidating cases, consolidated complaint and notice of hearing on June 9 in Cases 13–CA–33241 and 13–CA–33342. The consolidated complaint in paragraph V alleges that Respondent, by its Vice President and Manager Todd Hudson and by its supervisory agents and pilots Al Ballard, David Couch, Jim Hackworth, Craig "Buzzard" Nelson, Bob Partridge, Arthur "Peanut" Pattin, Dale Thomas, and Craig Zeedyk, during the period from mid-February through early March 1995, engaged in 35 acts of coercion of the bargaining unit deck hands, including a variety of threats of adverse consequences, promises of benefits, predictions of representation futility, predictions of inevitable strikes, coercive interrogations, statements creating the impression of surveillance of protected activities, all of which was calculated to dissuade them from supporting and voting for the Union in the scheduled Board election in violation of Section 8(a)(1) of the Act.

The complaint also alleges in paragraph VI that starting in late January 1995, Respondent instituted a new and/or more onerous disciplinary system which involved written warnings to employees and consequential employee suspensions whereby deck hands Karl Senff, Steven Bradley, Jeff Grossman, and William Vaughn were issued written warnings and Senff and Bradley were suspended, all of which was motivated as a general retaliation against the union representational efforts of its employees and a way of discouraging those efforts and therefore constituted violations of Section 8(a)(1) and (3) of the Act.

The complaint further alleges in paragraph VII that the written warnings issued to Senff and Bradley and their respective discharges on April 19 and May 9, 1995, and the written warnings issued to Grossman were motivated as a retaliation for their specific activities on behalf of the Union and they were violations of Section 8(a)(1) and (3) of the Act.

The complaint alleges in paragraph VIII that the alleged unfair labor practices are "so serious and substantial in character that the possibility of erasing the effects of these unfair labor practices and of conducting a fair election by use of traditional remedies is slight, and the employees' sentiments regarding representation having been expressed through authorization cards (by a majority of an appropriate unit of employees in December 1995 and known by Respondent to have designated the Union as their representative as evidenced by its unlawful conduct) would, on balance, be better protected by issuance of a bargaining order than by traditional remedies alone." See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

Finally, the complaint concludes in paragraph IX that the institution of the new disciplinary system violated Section 8(a)(1) and (5) of the Act, because of Respondent's refusal to bargain about it as was its general refusal to recognize and bargain with the Union as its employees' agents. Thereafter, a Report on Objections, Challenged Ballots, Order Consolidating Cases and Notice of Hearing was issued on June 13, consolidating Cases 13–CA–33241, 13–CA–33342, and 13–RC–19061 for hearing.

Respondent filed a timely answer to the complaint wherein it admitted allegations of supervisory status of the alleged pilot perpetrators but denied their agency status. As later explained

by Respondent, it argued that the pilots' admitted supervisory status and possession and exercise of supervisory indicia created a prima facie showing of agency status which is rebuttable by evidence of certain pilots' participation in union activities and other contextual evidence.

Respondent denied the unfair labor practice allegation but contends that even if any occurred, a bargaining order is unwarranted. At trial, the General Counsel amended the complaint by alleging additional threats, a prediction of bargaining futility in March 1995 by Hackworth, and a threat of discharge by pilot Jeffrey Barnett in February 1995. Respondent denied the allegations.

The consolidated proceeding was litigated in trial before me on July 10–14 and 24–28, 1995. All parties were given opportunity, within reason, to adduce relevant and material testimonial and documentary evidence, to examine and cross-examine witnesses, to argue orally, and/or to file posttrial briefs. The General Counsel and Respondent chose to file written briefs. The General Counsel's 67-page brief, in which the Charging Party joined, and Respondent's 91-page brief were, after an extended filing deadline, received at the Division of Judges on Thursday, September 28. Pursuant to agreement at the close of trial, General Counsel Exhibit 39 was retained by the parties for purposes of preparation of an explanatory joint stipulation which was later received by me on August 28, 1994, as General Counsel 39(a)[1] and incorporated into the record.

At the trial, the parties stipulated that Jeffrey Barnett occupied the supervisory position of pilot on the day of the election and was therefore ineligible to vote. Accordingly, they stipulated to sustain the challenge to his ballot and thus rendered the remaining two challenges as nondeterminative.

On the entire record in this case, including a transcript of over 1550 pages of testimonial evidence, numerous exhibits, and my evaluation of witnesses' demeanor, and in consideration of the briefs, I make the following[2]

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent, a corporation with an office and place of business in Lemont, Illinois (Respondent's facility) has been engaged in providing barge fleeting, switching, and harbor services for barge companies and various commercial enterprises. During the calendar year 1994, a representative period, the Respondent performed services valued in excess of $50,000 for companies directly engaged in interstate commerce.

It is admitted, and I find, that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

It is admitted, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The general issues are evident from the complaint allegations. More specifically, the paragraph V allegations of Section 8(a)(1) must be resolved by credibility determinations of the testimonial evidence. The entire General Counsel's case, including paragraph V allegations, rests upon the testimony of five persons. Those include Timothy Eaker, a pilot who had been discharged by Respondent during the Union's organizing campaign admittedly because of his prounion sympathies for the deck hand union representation; Roger Brock and Nathan Harper, deck hands still employed by Respondent; and the two chief alleged union activists who were terminated after the election, i.e., Steven Bradley for misconduct (expressed intent to fraudulently claim injury by taking a "spill" on a perceived objectionable boat assignment) and Karl Senff, an admittedly habitually tardy employee because of his persistence in tardiness and absenteeism. The General Counsel's only other witness, William Yockey, Union vice president and organizing representative, testified on peripheral matters as a rebuttal General Counsel witness. He also testified as an adverse witness for Respondent. The vast preponderance of testimony as to the multitudinous 8(a)(1) allegations and as to the discriminatory 8(a)(3) allegations rested upon Bradley and Senff. Respondent rebutted the testimony of the 5 General Counsel witnesses with the testimony of 23 nonadverse persons, including Manager Hudson, the alleged 8(a)(1) pilot perpetrators (except for Jim Hackworth who did not testify), deck hands who were alleged to have witnessed the incidents, and 1 police officer who contradicted Bradley's testimony as to certain aspects of his discharge incident which involved the officer.

The issues of pilot agency and the alleged change in disciplinary system do not necessarily rest on credibility. With respect to the disciplinary system, it is admitted that Respondent, on advice of counsel, changed its disciplinary system in part by instituting a rigid written warning practice other than a loose primarily verbal warning technique as it had employed before the union organizing campaign.

Whether a bargaining order is appropriate of course depends upon the resolution of the underlying issues.

B. Background

Respondent is engaged in the business of providing barge towing, fleeting, switching and related harbor services for barge companies and a variety of, other commercial entities. Its facilities are located in Morris, Ottawa, Peking, Liverpool, and Lemont, Illinois, of which the last is involved herein. Respondent's main office is situated in St. Charles, Illinois. Included there is the office of its president and chief executive officer, Bill Arnold. The management of the Lemont facility is the responsibility of its vice president, Todd Hudson, whose office is located there. The next level of Lemont management is that of the lead dispatcher, Wendell Hackworth, who has the overall responsibility for the movement of barges, the assignment of crews to and the dispatching of Respondent's boats which push or tow the barges. Hackworth is assisted by dispatchers Dave Herkel and Joey Wlas. All three are admitted supervisors and agents of Respondent. The lowest level of Respondent's management are the boat captains and pilots. Of two or more pilots assigned to a boat, one of them is designated boat captain.

[1] The parties stipulated that the original G.C. Exh. 39 is to be returned to Respondent on its request when this case is finally closed. Attached to Respondent's brief was an unopposed motion to correct a few minor transcript errors. It is granted.

[2] Preparation of this decision was delayed by closure of the agency due to the government funding crises of December 1995 and January 1996.

The Lemont facility is situated on a site adjacent to the waterway, i.e., the Chicago sanitary shipping canal, about 2 miles by gravel road from Lemont. It consists of an office building, a bunkhouse or crew quarters, parking lot, and campers. Pilots and deck hands use both the bunkhouse and campers for temporary sleeping accommodations. The Lemont facility services harbor facilities far inland on the waterway. Some of its employees reside at great distances from Lemont, e.g., Arkansas.

Dispatched at Lemont are two types of boats, line boats (live aboard boats) and harbor boats (dinner bucket boats). The line boats are outfitted with a food service galley and sleeping quarters for two crews of a pilot and two deck hands each who live aboard for periods of 21 days alternated by 21 days off duty. One of the pilots is designated as boat captain. The crews alternate active duty by 6-hour shifts. As of the trial, Respondent operated two line boats, the Emily B and the Ann G.

The harbor boat crew consists of one pilot and two deck hands who remain on board only for a 12-hour shift, after which they are replaced by a new deck hand crew. The shifts start at 6:30 a.m. or p.m. The harbor boat crews work 7 days on day shift (6:30 a.m. to 6:30 p.m.), then 7 days on night shift (6:30 p.m. to 6:30 a.m.), and finally they have 7 days off duty. As of the trial, Respondent operated three harbor boats, the Lorna Hackworth, the Captain Hackworth, and the Chris White.

C. The Union's Organizing Campaign

The initial contact with the Union was by Senff. He met with Union President Andrea Joseph in early 1994 and obtained printed union representation authorization cards referred to herein as pledge cards. Senff was to solicit fellow employees' signatures on those cards which unambiguously designate the Union as sole bargaining agent. There is no evidence that Senff or any other person, including co-solicitor Bradley, said anything to the solicited employees that would in any way undermine that purpose stated on the card. Senff testified that it was his interest to obtain representation for deck hands. However, he admitted that he had not discussed with Joseph just which employees he wanted represented until some subsequent occasion before the petition was filed. Joseph asked him whether he thought the pilots wanted representation but Senff responded that it was not his business to seek their representation. Senff signed a pledge card at least 6 months before the January 6, 1995 petition filing. Shortly afterward, he obtained a signed card from William Vaughn. From May 3, 1994, through December, Senff obtained signed pledge cards from 11 deck hands, i.e., Tim Waters, Steven Bradley, Dennis Mangrum, Jeff Grossman, Roger Brock, Jimmy Ward, George Yard, Brian McGladdery, Jerome Estes, Allen Heller, and Edwin Blatnicky.

From December 22, 1994, through December 25 and on January 10, pledge cards were also obtained by Bradley from seven deck hands, i.e., Tim Schaus, Mack Reeser, Jack Pierce, Hank Blasczczyk, Clarence Lawrence, Warren Marshall, and Toby Taylor. All pledge cards were turned over to the Union which retained custody. All were properly identified, authenticated and introduced into evidence.[3]

The General Counsel argues that there is no evidence to support Respondent's assertion at trial that the Union sought to simultaneously organize the deck hands and pilots at Lemont. It is true that neither Senff nor Bradley solicited pledge card execution from any pilot nor that any other person did so. Despite Yockey's evasive testimony to the contrary, the representation petition filed by the Union did in fact include in the appropriate unit petitioned for, both the pilots and deck hands. It was not until after the first day of hearing on the petition that it was agreed by the parties that pilots were to be excluded as supervisors after Respondent presented evidence as to their supervisory status. An election agreement was then also entered into by the parties. There is some evidence that Yockey did in fact inquire from some pilots in meetings with them their feelings about representation. Respondent argues that two pilots "actively supported the Union's effort to organize Respondent's employees" throughout the campaign, i.e., Jim Hackworth and Tim Eaker.

Eaker, who testified for the General Counsel, denied that he was an active supporter of the Union which he admitted initially sought to also represent the pilots. He denied making remarks to deck hands Brock and Harper that they would be better off with union representation. Brock and Harper corroborated him but Harper admitted that Eaker did discuss the higher deck hand pay at a union-represented competitor. Senff testified that Eaker openly stated to deck hands that they needed representation by the Union at least on six occasions after the petition was filed and as late as February 1995. Senff recalled an occasion when the two of them passed each other on the river on different boats or barges and Eaker loudly announced on a bullhorn, inter alia, "stop the abuse—vote yes—Garvey Marine for ILA," repeatedly as he passed on. This occurred in late February before the election. He testified that other deck hands witnessed it.

Another General Counsel witness, Brock, testified that on one occasion just prior to Eaker's February 29 discharge, in the presence of deck hands who were assembling a boat-barge tow, Eaker told them that they needed to campaign for the Union and that "we" needed all the help "we" can get on the line boats. Thereupon, Brock promised he would do what he could for the Union. After that, Brock testified he solicited and obtained some pledge cards.

Bradley testified that just before Christmas, he obtained and gave to Jack Hackworth a "couple" of pledge cards signed by Reeser and Schaus for mailing to the Union. Bradley did this, he testified, upon Senff's instruction that Jim Hackworth was the medium of transmission of signed pledge cards to be returned to Senff. Bradley testified that during a 10-day preelection period, when he worked with Jim Hackworth, the latter made prounion statements to him. Further, Hackworth told him the understood their union representation desires but that he, Hackworth, needed his job. On one occasion, Bradley proffered to Jim Hackworth a pledge card signed by Toby Taylor but was told "*we* don't need no more—we have enough." Hackworth explained to Bradley, "the Union is in." Accordingly, Bradley retained the card. On another occasion shortly after January 10, according to Bradley, Hackworth told him that the "Union is in, you have done it . . . ." Jim Hackworth was not called to testify for any party.

[3] Jerome Estes and Alan Heller were no longer working for Respondent when the election petition was filed in January; Brian McGladdery and Edwin Blatnicky were no longer working for Respondent when the election was held in March; Jimmy Ward and Jim Schaus were no longer working at Respondent's Lemont facility when the election was held; William Vaughn quit employment with Respondent in March 1995; and Steve Bradley and Karl Senff were discharged in April 1995. Hank Blasczczyk quit Respondent shortly before the hearing in July.

The Union filed its petition supported by executed pledge cards on January 6 in Case 13–RC–19061, a copy of which was served upon Respondent on January 10. The hearing in that case commenced on January 14 at which Senff and Brock appeared with union representatives, and Hudson and Wendell Hackworth appeared with Respondent counsel. The election agreement resulted in a Board-conducted election on March 8 and 9, at which Senff was the union observer. Twenty-two deck hands were eligible to vote.

D. The Election Campaign

1. Overview

After the election agreement was entered into, one of Respondent's attorneys, Kenneth Dolin, and Todd Hudson began to hold a series of meetings with the pilots in which he instructed them on how to effectively and lawfully campaign for the Company. The first of these meetings was held on February 6, 1995. Dolin met with the pilots individually and in groups and instructed them both verbally and by giving them written instructions on how to campaign lawfully.

Hudson also began to give a series of campaign speeches to the deck hands beginning in February 1995 after the election agreement was approved. Also, at that time, Respondent began to distribute written campaign materials to the deck hands on a daily basis through the day of the election. Hudson's speeches to the deck hands and Respondent's written campaign materials were replete with assurances that Respondent would bargain in good faith with the Union if it won the election; that benefits could go up, down, or remain the same as a result of negotiations; that the deck hands were free to vote however they liked in the election; that Respondent could make no promises or threats during the campaign; that no reprisals would be taken against any employees for their union activity; that the deck hands' jobs were safe as long as they did their job and followed the Company's rules; that a strike was not inevitable if the Union won the election; and that Respondent would continue to operate with or without the Union and even during a strike. Hudson repeatedly gave similar assurances to the deck hands during various conversations with them in groups and one onone. At the pilot meeting, they were instructed that they were speaking on behalf of management as its supervisors and were responsible for campaigning "effectively" among deck hands, to answer their questions on behalf of management and to convince deck hands to vote against the Union. Attorney Dolin also polled pilots to find out which deck hands supported the Union, which did not, and which were undecided. Respondent's Lemont pilots individually signed a document at the beginning of the campaign which set forth a pilot's duty to act on behalf of Respondent during the election campaign, i.e., "Supervisors have the right and obligation to speak out against the union . . . Garvey Marine expects each of its supervisors to campaign actively against the Union" and it concludes by specifically advising pilots that Respondent could become responsible for actions of pilots. The evidence clearly establishes that these requirements were communicated to pilots during the pilot meetings, and thereafter to individual deck hands.

2. Alleged change in discipline system

Hudson testified, without effective contradiction, that all employees were given written work rules on hiring, including a deck hand manual which remained unchanged after January 1, 1995. However, he testified that the enforcement of those rules was effectuated verbally by the captains and pilots, of whom the latter made effective disciplinary recommendations to the dispatchers, or to Hudson directly. He cited, without effective contradiction, certain examples of discharge discipline, e.g., a knife wielding deck hand who threatened a pilot, one incident of three intoxicated deck hands on duty aboard a boat; theft of a company car, and drug abuse.

General Counsel witnesses Eaker and Bradley and Respondent witness Jeffrey Barnett testified to other instances where on-duty intoxication and other misconduct were tolerated by dispatchers. They were not contradicted.[4] With respect to attendance, Hudson testified without specific citation that deck hands were discharged for repeated absenteeism. However, he admitted that with respect to deck hands' tardiness and punctuality before January 1, 1995, Respondent was "pretty lenient." He explained that this leniency was necessary because a good deck hand was a "rare commodity" who would be discharged only when he "got tired of it." A "green" deck hand needed comprehensive training and was susceptible to injury. Hudson testified incorrectly that after the filing of the petition, the Respondent instituted no changes in its disciplinary policy except that upon advice of legal counsel, discipline was now documented by written warnings issued to the deck hands. He testified that he tried be even more lenient. In fact, the written warnings explicitly committed Respondent to a definite progression to more severe discipline, which had not been the case with every verbal warning.

Eaker testified that the turnover of deck hands was very high because of voluntary terminations but that over a 2-year period of time, he could recall none that were discharged. However, Senff testified that there were deck hands who indeed were discharged for tardiness. None were identified. Senff admitted that from early in his employment at Lemont, he had a history of high absenteeism and tardiness for which he had been "hollered at a lot" by Wendell Hackworth and questioned a couple of time by Hudson. He testified that Wendell Hackworth warned him "numerous times" that he had better start getting in on time, and that such verbal warning continued up to the election. General Counsel witness Brock testified that Senff was tardy 3 or every 5 workdays at an average of 20 minutes each time. He also characterized Senff as having the worst tardiness record of any deck hand. He testified also that Grossman was tardy twice in every 2 weeks and that several deck hands were regularly absent. He was not controverted.

Eaker testified that he had two conversations which, it is argued, reveal Respondent's attitude toward a stricter discipline toward union supporters. The second with Jimmy Hackworth is uncontradicted and therefore credited. The first with dispatcher Wlas was not effectively contradicted. At first, Wlas could not "recall" the conversations. When counsel finally managed to elicit a categorical denial, it was given in a barely audible, unconvincing tone of voice with total lack of conviction and certainty. I credit Eaker despite his credibility weaknesses, i.e., contradiction by other General Counsel witnesses as to his union activities and evasiveness and hostility in cross-examination. Accordingly, I find that the following conversation occurred.

Eaker had been the only full-time pilot excluded from the pilot meetings presided over by Attorney Dolin and Hudson. He

[4] Dispatcher Herkel did not testify. Wlas' nonrecollection did not constitute an effective, convincing contradiction.

was admittedly excluded because he was perceived by Hudson to be irrevocably sympathetic to the union cause and an active supporter of it. Prior to the pilot meetings in late January, Jim Hackworth engaged in a boat-to-boat cellular telephone conversation with Eaker wherein he told Eaker that he had been ordered by Hudson to terminate any deck hand that gave him any problems whatsoever.

In mid-January, Wlas told Eaker that Respondent was aware of the union campaign and he asked if Eaker was involved in it. When Eaker denied involvement, Wlas responded, "good"—because Hudson will have the head of "anyone" involved in it.

Eaker testified to a third cellular boat-to-boat conversation with pilot Craig "Buzzard" Nelson in late January. Nelson's testimonial denials in many areas were either uncertain or were not categorical. However, with respect to the Eaker conversation, he was vehemently certain and convincing. Because of Eaker's credibility problems noted above and the relative vagueness of his account of the Nelson conversation, internal inconsistencies and less convincing demeanor, I credit Nelson's denial that he ever told Eaker that Senff, Brock and Waters were on a "hit list" of deck hands to be discharged. Furthermore, it is unlikely that Nelson would have referred to any listing of employees prior to the pilot meeting at which estimates of deck hands' union representation attitudes were reviewed name by name, and a list was allegedly constructed by Dolin.

3. Intimidation—8(a)(1) allegations

a. Jim Hackworth—paragraphs V(f), (g), (h), and (k)

Testimony by the General Counsel's witnesses as to statements by Jim Hackworth are uncontradicted. Although many of those witnesses did not exhibit the highest credibility and were vulnerable in several areas, none were inherently, totally unbelievable. Accordingly, I must credit them, except where otherwise noted, as to conversations with Jim Hackworth as uncontradicted by him as follows:[5]

(1) Roger Brock—paragraph V(g)—surveillance impression

Jim Hackworth and Brock worked together on the Lorna Hackworth. During a 2-week period preceding the election, i.e., late February and early March, they had a couple of conversations in the boat's pilot house wherein Hackworth stated that Respondent's attorney, Manager Hudson and owner Bill Arnold had identified Brock, Senff, and Bradley as union ringleaders. Hackworth further explained to Brock that at a pilot meeting, the attorney had a list of all deck hand names which they reviewed and characterized as to union sympathy, antipathy, or neutrality. When they came to Brock's, Senff's and Bradley's names, they were identified as "ringleaders." In other conversations in the pilothouse, Hackworth told him that he had asked Hudson for money to take Brock, Senff, Grossman, and Pierce to a bar to propagandize over beer, but Hudson said that was a waste of money to do so with Brock and Senff because they were definitely prounion. Senff testified that he abandoned any secrecy in his union activity after January 6. Brock testified for the Union at the representation hearing. His ing. His mother owns the tavern where union agents met deck hands.

(2) Karl Senff—paragraph V(r)—threats, promises, and futility of representation

Subsequent to the election agreement and before the election, Jim Hackworth and Senff engaged in 8 to 12 conversations regarding the Union, of which a couple were in person and the rest on their home telephones. Senff had not worked with Jim Hackworth after the filing of the petition.

Among other things, Hackworth told Senff that the management had determined that pilots were supervisors and, as such, Hackworth was told that he had to support Respondent's position against union representation and that it was his duty to persuade deck hands to vote against the Union but that he must take care what he said to the deck hands. Hackworth told Senff that if they were represented by the Union, the Respondent would not negotiate with the Union and would eliminate their 401(k) savings plan and oblige them to pay for necessary equipment such as gloves, safety glasses, and knives, previously provided gratis. Hackworth said they would get a 9-percent raise, compensated overtime especially for deck hands on the Lorna Hackworth who work out of town a lot more and who frequently work over 12 hours if the Union lost. He also promised better health insurance benefit and rates improvements. However, he said that if they voted for the Union, the deck hands on line boats would lose travel pay calculated on the distance from their houses to their assigned boats. Deck hands were not paid overtime compensation but rather a straight rate of pay of $93.50 per day or $100 for a second continuous watch, but nothing for an hour or 2 over 12 hours.

In one conversation, Jim Hackworth told Senff that he overheard Hudson conversing with a representative of National Marine, a nonunion competitor, concerning placement of one of their boats in the North Chicago area to service Respondent's customers there if the Union won the election. Further, he told Senff that Respondent and National Marine were devising some form of joint venture whereby Respondent would switch its name to National Marine and close its operations as Garvey Marine if the Union won the election.

(3) Steven Bradley—paragraphs V(h) and (r)—threats, impression of surveillance

Bradley testified that after the election in mid-March, he had a conversation with Jim Hackworth. Several deck hands testified about rumors to the effect that Respondent maintained a "hit list" regarding prounion deck hands. They attributed the source of that rumor to Senff, not to any pilot. Bradley testified that he had heard the rumor and because he considered Jim Hackworth to be "cool" with respect to answering questions, he asked him "about the hit list." It is not clear how he posed the question to Hackworth. However, Hackworth allegedly answered that he saw "it" at a pilot meeting. In cross-examination, Bradley explained that that the pilot meeting referred to by Hackworth preceded the election. Bradley asked if his name was on it and that Hackworth explained to him that there was a list with the names as "yes's" and "no's" and that Bradley was listed as a "yes," i.e., likely to vote for the Union were Senff, Brock and Harper; that listed as "no's" were "Dale," "Troy," and "Warren" and that listed as "maybe's" were Jack Pierce and Jeff Grossman. Hackworth then stated that Hudson instructed him to "work on" Grossman to change his vote. In direct examination, Bradley testified that Hack-

[5] Although some alleged witnesses testified that they "recalled" no such statements by Hackworth, I do not consider this to be as probative as Hackworth's own denials might have been.

worth said that they determined those deck hands whom the pilots would have to "work on" and those whom they have "to get rid of." In cross-examination, Bradley testified that it was he who used the phrase "hit list" in the conversations, i.e., *after* Hackworth described the categorization of employees. Bradley told him "it sounds like a hit list." This is contrary to his direct examination description of how the meeting started. Furthermore, in cross-examination, Bradley testified that he could not recall "any" response from Hackworth after he, Bradley, characterized the list as a hit list. Thus Bradley's cross-examination at best totally confuses exactly what Hackworth did say and what were Bradley's subjective impressions and conclusion, and, at most, is self-contradictory. Despite the failure of Hackworth to testify, I cannot confidently rely on this aspect of Bradley's testimony. At most, it can be relied upon only as arguable evidence of impression of surveillance by Respondent, i.e., paragraph V(h). It is also consistent with Brock's account of how Hackworth described the categorization process, i.e., no reference was made to an expressed intent to discharge the "ringleaders."

b. Todd Hudson—paragraphs V(a)—statement of representation futility

The complaint alleges that in mid-February, Hudson, either at the Lemont facility or aboard a boat, informed employees that selection of the Union as bargaining agent was an act of futility. The General Counsel cites the testimony of Bradley and Eaker regarding conversations with Hudson as "independent evidence of knowledge and union animus."

In the Bradley conversation, it was Bradley who told Hudson at the Lemont office that it was futile for Hudson to try to persuade him to vote against the Union. He did so by peremptorily interrupting Hudson who was in the process of reading to Bradley a statement of Respondent's position, itself not alleged to be coercive. According to Bradley, Hudson flushed and appeared angered, but the encounter ended as two visiting coast guard officers entered the office. Later in the day, Bradley was approached by Hudson who had driven his Blazer vehicle to a point away from the Lemont at the North Slip. Hudson attempted to explain Respondent's financial position. Bradley turned to another topic, the remuneration of deck hands who attend pilot training school.[6] Hudson encouragingly told Bradley that he was eligible for that preexisting benefit when and if a pilot position opens but he could make no promises. Bradley allegedly told Hudson that he did not want to get fired because he had solicited the union cards, as pilot Partridge had allegedly threatened him. It is not clear whether this preceded or was subsequent to the pilot training discussion. Bradley inexplicably was silent as to what, if any, response he got from Hudson. I conclude that there must have been more to the conversation. The conversation occurred sometime between February 10 and the election. It was not until cross-examination that Bradley testified "yes" to the question whether Hudson told him that the Union "would not get anything," and that the Company "has the final say," and that deck hands "now have all they will get." He then admitted that these may not have been Hudson's "exact" words.

[6] Other deck hands such as Ralph Vaughn and Jeff Barnett had been reimbursed for such training and informed Bradley who had never heard of the policy. There is no allegation that such reimbursement was unlawfully instituted to interfere with the election.

Hudson testified, without rebuttal, that he attempted to read the position statement to Bradley, but that Bradley laughed at him and interrupted him. With respect to the North Slip–Blazer conversation, Hudson read the rest of the document to Bradley. They then discussed the pilot training reimbursement policy, at which point Bradley claimed that he was the one deck hand who was obtaining all the signed pledge cards, that he had the power to affect the results of the election one way or the other and that if he were given a pilot's license, he would get the deck hands to vote "no." Hudson said he refused to promise anything. In cross-examination, Bradley denied soliciting the pilot license bribe as testified to by Hudson.

Bradley was accused of similar attempted manipulative conduct by Jeff Barnett and deck hand Ralph Guilliams. They testified that Bradley threatened them and all pledge card signers with exposure of a list of signer identities he maintained to the Respondent if the election did not result in a union majority, i.e., Bradley knew that enough cards were signed to warrant such majority and that such a threat to expose all would dissuade those who appeared to be wavering. Barnett testified that some card signers were now saying publicly that they would vote against the Union. Ralph Guilliams testified that in February or March, Bradley warned him that if he did not quit talking against the Union that "they" could mess up his car and mess him up personally. To that, Guilliams responded that he had "toys" as big as those possessed by the Union.

Another aspect of what might be described as manipulative tendencies by Bradley is his admitted overt tape recordings of conversations with Hudson, other pilots and even deck hands, assisted in part by Senff, in order to obtain some incriminating statement. The tapes were produced at trial upon Respondent's demand and contained no such statements and significantly no corroboration of any of his testimony.

Bradley denied making the threat of exposure to Guilliams or to any one else, and he denied having made the "messing up" threats to Guilliams.

It is undisputed that the statement read to Bradley by Hudson reflected the Respondent's opposition to representation by the Union and, inter alia, recited some objective economic facts of life. It is also undisputed that it recited its intention to fulfill its legal obligation to bargain with the Union if elected and gave an objective description of the bargaining process. Nothing therein is alleged to be coercive.

Other preelection Respondent campaign documents and speeches by Hudson expressed an intent to bargain in good faith if lawfully obliged. No other deck hand witness testified to any references of representation of futility to them by Hudson. General Counsel witness Harper testified that in the days immediately preceding the election, he had several innocuous conversations with Hudson about union representation. On one occasion, Hudson told him that he did not care which way he voted and that as long as he did a good job, he would have a job with the Respondent. Other witnesses alleged by Bradley to have been present during certain conversations either denied them or could not recall them. One witness, a police officer, contradicted him.

Bradley's testimony as to the Hudson futility statement did not arise until his cross-examination. As to the conversations between them, I found the testimony of Hudson more complete, coherent and convincing. Bradley was often inconsistent and shifting in his testimony. I also find the testimony of Guilliams and particularly Barnett much more spontaneous and convinc-

ing that than of Bradley. Their testimony of the threatening conduct by Bradley coincides with Hudson's account of the manipulative deviousness engaged in by Bradley. I credit all three of them and discredit Bradley's half-hearted unconvincing denials. I therefore find no credible evidence to support the complaint allegation relating to Hudson. Inasmuch as we have now delved into Bradley's credibility, so far found wanting, it would appear appropriate to next evaluate other complaint allegations which rest upon his credibility, i.e., alleged conduct by pilots Partridge and Pattin.

c. Partridge—paragraphs V(j), (k), and (l)—threats of discharge, facility closure, and loss of benefits

Robert Partridge is the captain of the line boat Emily B and a Veteran pilot of 10 years' experience. His regular deck hands were Ralph Guilliams, Barnett, Mangrum, Taylor, Reeser, and Bradley. Just before Christmas 1994, the Nathan Harper decked two trips of 21 days each on the Emily B. Partridge testified that he spoke very little with Bradley because the latter served on the other watch. However, he testified that in the galley, Bradley and Harper "hit" him with questions" about the Union on February 1 and 2 usually, in the presence of Ralph Guilliams, Mangrum, and Reeser who were regulars in the galley. Partridge testified that he attended pilot meetings and was aware that he was expected to respond to deck hand questions about the Union and to state the Respondent's position.

Bradley testified that the first galley conversation occurred shortly after the petition filing of January 6 at 11:30 a.m. to 12 noon, just after Partridge descended the galley steps and stated that he had just finished a telephone conversation with Hudson. Present were R. Guilliams and Reeser. According to Bradley, Partridge announced that "somebody just got them a union started here and if [Todd] Hudson finds out who started this, they are going to be down the road" and Hudson would fire whoever started it. Partridge then allegedly stared at Bradley and asked what he thought about it, whereupon Bradley walked out. Bradley then testified very broadly that Partridge on "numerous occasions within a span of 1 week" came into the galley and started talking about the Union and what the Respondent would do about it. Therefore, the conversations would have been in January. Bradley specified one occasion as the day after the election petition filing, January 7, with the same audience, at watch change when Partridge said that if a union would come in, they would close the doors for 24 hours and open up in another name and be rid of the Union. He recalled another occasion which he set this time at around February 1, after the pilot meetings started, when he and Partridge were alone in the galley. Partridge told him that if the Union came in, Hudson would take away the deck hands' 401(k) savings plan, insurance benefits, and travel pay and all he would get was $93.50 a day or that Hudson had told him of this intention. Bradley testified that he responded on one occasion, "I'll take my chances with the Union."

Bradley testified that on another preelection occasion on the Emily B, on the same February trip, as he was boarding, Partridge told him in the presence of Ralph Guilliams and Reeser that Respondent would maintain two different crew changes, i.e., an antiunion crew on the National Marine side of the river and a prounion crew on Respondent's side of the river and "just weed out "the pro-union employees." There was no further elucidation of this proposed scenario.

In cross-examination, Bradley testified further that "all" the conversations wherein Partridge referred to the Union occurred between February 1 and 14 on a daily basis, contrary to his initial testimony on direct examination. Payroll records reveal, however, that Partridge was on leave from the Emily B for 1 week starting February 9.[7]

Bradley failed to place Harper at any conversation in which Partridge referred to the Union during Harper's trip on the Emily B. However, Harper placed "all" crew members, including Mangrum and Taylor, as present at a conversation he allegedly had with Partridge which Bradley did not corroborate. Harper commenced the first of two trips on the Emily B before Christmas, and the second trip ended on February 1. Harper testified that his conversation with Partridge on the Emily B occurred during his last trip on some unspecified date during the "last few weeks" before the election. Since Harper did not work thereafter on the Emily B, the conversation he alluded to could not have occurred in the last few weeks before the election unless you stretch the definition of that phrase. In cross-examination, Partridge conceded that his conversation with Harper might have occurred earlier, not necessarily on February 1 and 2, as he first had testified when he said both Harper and Bradley "hit" him with questions about the Union.

Neither Harper nor Bradley denied questioning Partridge together or separately on the galley. Bradley's trip overlapped Harper's trip only on the half-days they worked on January 11 and February 1.[8] Harper testified that in his conversation, the deck hands, including Taylor, Mangrum, and others which included the entire deck crew whose names he could not recall, were "basically" discussing the Union when at one point Partridge stated that if the Union came in, "that basically" the crew would be out of work because the company would not negotiate with the Union. He testified that "quite a bit" was said. However, his recollection was somewhat skeletal and somewhat unclear. First, he testified that Partridge said that if the Union came in, the deck hands would be "pickets" and they could hire all new men and would "go business as usual." Harper testified that he then said "in a joking way" that if the deck hands picket, the boats will be tied up, at which point, according to Harper, Partridge "said what he said," and Harper said that Partridge said [sic] that he would not tie up his boats until Hudson ordered him to. According to Harper, he then chided Partridge for being a "die hard" who would continue to "drive whatever happens," even if someone would "pop a cap" [sic] at him. Harper then testified that everyone, including Partridge, then

[7] Payroll records in evidence disclose that Bradley's December—January 21-day trip on the Emily B ended on January 11. His next trip was from January 30 (one-half day) through one-half day on February 19. Guilliams' trip paralleled Bradley's except he continued through February 27. Reeser worked only one-half day on January 5, 6, and 11 and thereafter from January 12 through March 12, apparently working beyond the usual 21-day trip. The same payroll records disclose that Harper started on the Emily B for one-half day on January 11 and continued thereafter until he finished with one-half day on February 1. Mangrum was aboard from January 6 through one-half day on February 1. He returned on February 24 and worked at least through March 12. Partridge was only absent a few days in the entire period. Deck hand Toby Taylor started with one-half day on January 5 and 9 and then continuously from January 10 to one-half day on February 1. He resumed on February 22 through March 12.

[8] R. Guilliams, Reeser, Taylor, and deck hand Dennis Mangrum all worked on January 11 and February 1, albeit some on half-days.

laughed. Inexplicably, Harper then testified that though Partridge joined the laughter, he "got furious."

Partridge testified that during his conversations with Harper, Bradley, Reeser, Guilliams and Taylor, he initially told the deck hands that he did not want to hear anything about the Union because if he did, he would report it to the office. In cross-examination, he admitted that when asked questions about the Union by deck hands, he responded with as much information as he possessed, i.e., after attending pilot meetings in February. He also explained that Respondent occasionally obtained permission to use National Marine fleeting as well as some of their slips. He explained that rumors were prevalent in 1994 about the purchase by Respondent of National Marine's fleet and harbor service.

Partridge testified that he was unaware of having a conversation with Bradley on the Emily B on the very day that Respondent was notified of the election petition filing. This would have to have been between January 7 and 11 when Bradley's trip ended. He denied participating in conversations about the consequences of a petition filing. He denied having made any statement to the effect that Hudson had threatened retaliation and denied having made threats of closure and reopening as a nonunion business, threats of loss of the 401(k) plan, and restriction of pay and benefits to deck hands. He testified that what he did tell deck hands, including Bradley, was that when they did settle on a contract, they had better be sure that it explicitly contains all the benefits they want and that it is "down on paper."

Partridge denied making the reference to National Marine and insisted he had no idea of how you could divide union and nonunion deck hands work geographically by the river which is inconsistent with the way crew changes are made, i.e., wherever the boat is located at the crew change time. Partridge testified with a great deal of emphatic vigor that the only subject of discharge to arise in conversations with Bradley was Bradley's repeated preelection request to him and to others, including deck hands, that he be fired so that he could collect unemployment compensation, cut firewood, and "roll big ones."

With respect to the Respondent's literature which he set out on the galley bar, Partridge testified that deck hands asked him to explain therein the reference to striker replacement. He testified that he explained that strikers can be replaced during a strike but would be reinstated at the end of the strike and the replacements would be terminated. He could not recall all the details of the conversation he had with Harper in the presence of Bradley, Guilliams, Mangrum, and Reeser. But he vividly testified to what he did recall. He testified that Bradley claimed that the Union would not strike but he, Partridge, responded by saying that after negotiation, either a contract would be reached or there would be a strike. Partridge then asked him what he expected if there was no agreement, i.e., would the Union merely slap Respondent's hands. Bradley insisted that "this Union" did not strike. At that point, according to Partridge, Harper said that if there was a strike, the Union would picket "anyone coming in and asked Partridge how Respondent would operate the boats without deck hands. Partridge says he responded that there were enough pilots to operate without deck hands, to which Harper said that there were "a lot of trees between here and south Chicago; you can be shot at." Partridge testified that he retorted that he would have to get a gun and shoot back because no one was going to "mess up" his livelihood. Partridge denied stating that there necessarily would be a strike because the Respondent would not negotiate. He admitted that Harper may have called him a die hard and may have said other things at the meeting.

Reeser, a fluent, spontaneous, convincing witness, testified that the solicitation of pledge cards was pretty well known among the deck hands. He recalled one undated occasion when Partridge stated in a conversation with him, R. Guilliams and Bradley that he had just finished a telephone conversation with Hudson and was told that a "union deal" was getting started. He did not specify whether this referred to the petition date or to the date of election agreement. He recalled no reference to anyone being "down the road" nor any pilot conversation about pay increases. He categorically denied that any pilot promised him improved medical insurance, overtime compensation, or a pay increase to vote against the Union. He recalled no discussion of the 401(k) plan except one which he individually raised with Hudson, during which Hudson said it was a matter to be negotiated if the Union was designated as bargaining agent. Reeser categorically denied that Partridge referred to any job loss or made any threats in preelection galley conversations and recalled no such conversations referring to a 24-hour closure and reopening nor, to the river division by union sentiment.

Similar categorical denials and a few nonrecollections of alleged Partridge comments were also elicited from Ralph Guilliams, a somewhat more subdued witness who benefited from the pilot training reimbursement program, as also were elicited from Dennis Mangrum, a stolid, unwavering witness who testified in a clipped monotone, but with conviction and certainty. Reeser and Mangrum signed pledge cards for the Union.

Barnett testified that when he was still a deck hand, Bradley urged him to cause his discharge by twice kicking rigging, i.e., Respondent property, into the river. Further, he testified in a very convincing demeanor that just before the election, in the crew quarters, Bradley told him that if the Union lost the election, the Union would file charges and that the more people that were fired or who quit, the better it would look for the Union.

In addition to Bradley's credibility problems already discussed, his vacillation as to the dates of conversations and lack of corroboration by anyone, including Harper, further erode his credibility. The testimony of Partridge was given in a spontaneous, convincing demeanor without hesitation or any indication of lack of certitude. Reeser maintained a similar convincing demeanor. On the point cited, Barnett was very spontaneous and certain. His testimony and Partridge's testimony as to Bradley's solicitations for a discharge were not contradicted and further portray Bradley as a self-perceived, clever manipulator. Accordingly, I discredit Bradley and credit Respondent's witnesses.

With respect to Harper's testimony, I credit Partridge that Bradley was present on at least 1 day of overlapping trips. Yet, Bradley did not corroborate Harper. Furthermore, Harper was a hesitant witness whom the General Counsel characterized as "reluctant." The question is, was he reluctant because he risked the displeasure of his employer, or because he did not have confidence or certainty in the accuracy of his testimony? I find the phraseology of his testimony and demeanor suggestive that it was subjectively conclusionary. I found Partridge to have been much more vivid, detailed, certain and convincing. I credit Partridge's denials and conclude that Harper, perhaps a basically honest witness, rendered a recollection of what he perceived Partridge to have said rather than what Partridge actually said.

d. Arthur "Peanut" Pattin—paragraph V(m)—threats of discharge and "plant closure"

Arthur "Peanut" Pattin is a licensed pilot of 20 years' experience and the captain of the Ann G line boat. In previous employment as a deck hand and as a pilot, he was a union member. Partridge was on leave from the Emily B, according to payroll records, from February 9 through 15. Pattin replaced him as captain for that week. His copilot was Jerry Burns and Bradley was one of his deck hands.

Bradley testified that he had a conversation in the Emily B galley "just after " Partridge had allegedly threatened him and had commenced his leave.[9] He testified that Ralph Guilliams was initially present but arose and departed at some point afterward. According to Bradley, the conversation arose after Bradley had read Respondent's campaign literature he had received from pilot Burns and asked Pattin some unspecified question about it. According to Bradley, Pattin said that Bradley knew nothing about the Union but that during Pattin's prior employment, he felt it was worthless and costly in dues and fees. Bradley then testified in generalities that Pattin "discussed" what Respondent would do if the Union won the election, i.e., change crews at National Marine with "anti union people," and also said "something" about closing the doors in 24 hours and reopening under a new name.

Ralph Guilliams testified that he never heard any pilot threaten discharge or company closure and nonunion reopening. In view of Bradley's low credibility already noted, including his lack of consistency, lack of corroboration and because of his generalized account of Pattin's remarks, I credit Pattin's more detailed version of what he told deck hands, including Brock, regarding the Union during his 1-week preelection tour on the Emily B. I find that he was asked whether employees could work after an unsuccessful strike, and he answered that strikers would be reinstated; that with reference to a Respondent election handout, Bradley challenged the reference to a financial statement therein as subject to falsification which Pattin discussed and defended in an objective noncoercive manner; that on one occasion, he told Bradley he could not answer his questions; that he may have discussed his past union experience with a deck hand, probably Ralph Guilliams, who asked about the nature of negotiations, which he answered in part by explaining that benefits and pay raises are not automatic but are obtained in negotiations which are serious and time-consuming. He did not recall discussing union dues but categorically denied telling any employee what the Union's dues would be if it were elected; nor did he discuss the consequences of a union victory; nor that if the Union won the election, there would be a change of crews and use of nonunion National Marine crews; nor did he refer to any 24-hour closure. He possessed a dispassionate, confident demeanor and rendered the categorical denials in a calm, quiet, soft-spoken but very effective manner. Cross-examination in a rapid, clipped interrogation may have caused a minor befuddlement, but his credibility was not impeached.

[9] As noted above, Bradley was inconsistent as to when these threats by Partridge had occurred. At one point, he placed threats in January; at another on February 1; then in cross-examination, daily between February 1 and February 14, clearly impossible as Partridge was absent on and after February 9.

e. Craig Zeedyk—paragraphs V(p) and (q)—threats; interrogation

Karl Senff and Nathan Harper testified in support of allegations concerning Zeedyk as well as statements reflecting Respondent union animus. Much of Zeedyk's testimony was qualified by "I don't remember" and "to the best of my knowledge" responses, even when asked "are you absolutely sure." When I asked him to explain what he meant by the phrase "to the best of my knowledge," he candidly answered, "I just don't remember [events that took place in January and February]." He explained that he talked to "the guys, you know and just B.S.ing a lot of things" while at the same time trying to "comprehend" and "hold inside" things "while trying to do your job– I don't recall—I don't remember." In redirect, he testified, "I don't really remember if I talked to Senff about the Union" and "I don't believe he was on my watch." Some of the language attributed to Zeedyk is fairly blunt, if not brutal, and is of the nature that would be expected to be remembered whether it was said or not. I do not find his testimony to constitute a convincing, credible categorical denial. Further, his credibility was eroded by a demeanor that evidenced uncertainty, was hesitant and lacked spontaneity. I must credit the testimony of Harper and Senff despite problems with their credibility. Additionally, Zeedyk was evasive and inconsistent in cross-examination as to whether he was expected as a pilot to represent Respondent's position to the deck hands. At one point, he testified that he was neutral but he admitted that he had signed a receipt of a statement of supervisory responsibility with respect to Respondent's position. Accordingly, I find as follows:

Zeedyk and Mike Coffey were copilots of the Chris White, a harbor boat. Senff testified that he had occasion to enter the wheel house of the Chris White on some date during the second week of January to engage Zeedyk in several conversations. The implication is that Senff was on duty, but it is not clear. Payroll records reveal they both worked the Chris White during the weeks ending January 29 and February 26 and also worked together on the Captain Hackworth in the week ending February 12. In any event, Zeedyk took the opportunity to say to Senff that there was a "big union thing going on" and he asked Senff if he heard about it. Senff answered that there was always a union thing going on since he started employment at Respondent in the summer of 1993. Zeedyk responded that it was "serious" this time and employees are actually doing something about it, i.e., deck hands. Senff answered that if they come to him, he will talk to them. Zeedyk said: "No, if they find the guy responsible they are going to make a big example out of him." Senff asked "how is that." Zeedyk responded, "they will fire his ass quicker than shit." Senff said "that's what I thought you meant" and quickly departed.

Ten days prior to the date of his testimony, Zeedyk had a conversation with Harper. Zeedyk told Harper that the instant trial was to be held in 10 days and that "all the guys who started the union crap" would be fired if they were so much as 5 minutes late for duty."

f. Dale Thomas—paragraph V(n) and (o)—predictions of futility and inevitable strikes; promises; threats

The allegations regarding Pilot Franklin Dale Thomas depend upon a credibility resolution between his testimony and that of deck hand Roger Brock, a current employee who risked Respondent's displeasure by testifying against it for no palpable benefit to himself.

Brock was one of four pilots assigned to the Lorna Hackworth boat. The others were Nelson, Ballard, and Jim Hackworth. The team of regular deck hands included Brock, Pierce, and Senff who at one point switched boats. The Lorna Hackworth builds tours in Lemont and runs to Chicago on a regular basis serving customers between Crawford Station and points in the northern Chicago suburbs. Thomas admitted to having had conversations mainly with Senff and Brock between January 1 and the election. With respect to Brock, Thomas admitted to having discussed the forthcoming union election a few times in the wheel house after the petition filing. He could not recall how many. His account of the conversations was very cryptic, i.e., they discussed the good and bad aspects of union representation. He then testified that he told Brock that he agreed with what the deck hands were doing for themselves but that he was personally against the Union. He testified he could not recall the full conversation on the grounds that they were a "nightly" event, not the "few" occasions he first admitted, but that he "turned off" Brock who did most of the talking. When asked whether they discussed what might happen if the Union won the election, he could not recall but conceded, "I'm not sure it was discussed." Certain one word categorical denials were solicited and obtained, but Thomas conceded the subject of strikers was discussed. Thomas' demeanor was that of a hard-edged, calculating witness.

I find Brock's testimony more spontaneous and credible. It was vividly narrated and more fully descriptive of what actually was said. Thomas conceded that conversations occurred nightly but could not or did not testify as to his recollection of what was said. He was inconsistent as to whether they were two-way discussions or monologues by Brock. Brock's detailed recollection as to what was said outweighs the probative value of Thomas' generalized, conclusionary, solicited categorical denials. Accordingly, I find the following occurred.

During a period preceding the election from 1 month up to 2 weeks before the election, Thomas and Brock, when alone in the Lorna Hackworth wheel house, engaged in continuos conversations which referenced the consequences of a union election victory. Thomas said without qualification that the Union would strike because the Respondent was not going to agree to any bargaining demands and that if the Union attempted to prevent Thomas from working, he would threaten physical violence. Thomas further stated that there were several rules that Respondent would start to enforce as, for example, those related to the wearing of lifejackets and carrying lights during situations of minimal need. Thomas referred to a list of such rules. He went even further to suggest that it would be very easy to arrange a shipboard accident whereby Brock could be knocked into the river and crushed between the river side wall and the boat. These conversations were repeated over the period of 2 weeks. Further, Thomas told Brock that Respondent could fire all the employees and reopen after a short period of time without union representation and if the deck hands wanted re-employment, they would have to work for less money than they now earned. Additionally, Thomas told Brock several times that during pilot meetings, Brock was identified as one of the union ringleaders. Finally, Thomas put away the club and raised the carrot and told Brock that if they voted to keep the Union out, he could ask Hudson for anything he wanted and would get it. Brock admitted that he did not keep secret his union support and assumed that Respondent was aware of it because he testified for the Union at the representation hearing.

In cross-examination, Brock conceded that Thomas gave him trouble for a long period preceding his union activity. However, although he admitted that he told this to Hudson, he also testified that he complained to Hudson that Thomas had been "hammering" him about the Union and asked Hudson to stop Thomas and Hudson promised to do so. This is in the context of a conversation with Hudson after the election wherein Hudson answered Brock's question as to what will happen now to union supporters by responding that it would be business as usual and he just wanted to "put this in the past." However, Thomas kept hectoring Brock that he would try to get him fired. Brock complained to Hudson. Brock admitted that at one point he told Hudson that Thomas' threats probably were not even caused by Brock's perceived union support but were historical and personal. Hudson did not explicitly contradict Brock. Hudson testified that Brock did complain that Thomas was intending to discharge him because of "problems," he had with Thomas a few weeks earlier. Hudson assured Brock that he was doing a good job and had nothing to worry about. Hudson did not explicitly deny that Brock referenced Thomas' threats to his union activity. In cross-examination, Brock even more vividly recounted Thomas' union-referenced threats of physical violence, i.e., in the first preelection conversation, Thomas said he would like to "beat the shit" out of anyone who was involved in the Union and later threatened to "beat the asses" of all prounion deck hands and stated that he had a 44 magnum pistol for anyone who tried to keep him from working during a strike and how easy it would be to arrange the crushing of a prounion deck hand by arranged accident.

Whether or not Thomas harbored a nonunion related grudge against Brock which motivated him to seize upon Brock's perceived union activities to "hammer" him is irrelevant, as I find above that Brock in fact was coerced by Thomas as he testified.

g. Jeff Barnett—paragraph V(s)—threats

Jeff Barnett had been employed 4 years by Respondent and only recently was promoted from deck hand to pilot. His supervisory status on the election date was stipulated to sustain the challenge to his ballot. Like Ralph Guilliams, he had been reimbursed by Respondent in February 1995 for pilot training school expenses incurred in the early summer of 1994. In July 1994, he obtained a pilot's license. After that, up to the election, he served at times on all harbor boats as a pilot when needed and as a deck hand, and was paid proportionately. After he received his license, there was a spurt of business and an extra boat, the Harvey C, was transferred to Respondent from another division, on which Barnett was a pilot up to some time before January 1, 1995. Payroll records show the Harvey C was not used after November 1, 1995. Between that date and the election, he testified that he worked half his time as a pilot as needed and half as a deck hand. He testified that he replaced Eaker on the Captain Hackworth when Eaker was suspended. Eaker was suspended on February 26 and terminated on February 29, well in advance of the election. Other General Counsel witnesses' testimony estimates that a higher percentage of Barnett's time was worked as a pilot. Payroll records indicate he worked and was paid more often as a pilot by a preponderant majority of time. But they are not entirely clear. As a witness, Barnett projected generally a fairly convincing and sincere demeanor. However, when he testified with confidence, he was fluently spontaneous; but when he lacked confidence, he was palpably hesitant. The General Counsel elicited the testimony

of both Brock and Senff as to "heads are going to roll" statements made by Barnett in early January immediately after the petition was filed. Barnett was questioned in direct examination in reference to the alleged conversation with Senff. He weakly and hesitantly testified that he did not recall but he agreed that yes, he thinks he would remember such a statement had he made it. Clearly, such a brutal prediction is of a character that I would have expected Barnett to be able to categorically deny with certitude, given his recollective abilities in other testimonial areas. The statement attributed to heads rolling is of a similar nature as one I have already credited as having been made by Wlas who referred to Hudson's initial reaction to the petition, i.e., long before Attorney Dolin commenced his instructional February pilot meetings. Accordingly, I credit the more convincing and probable testimony of Brock and Senff and find as follows:

Immediately after the filing of the petition, in the crew room of the Lemont facility downstairs below the office and in the presence of several deck hands, Barnett stated that he had just finished talking to dispatcher Wlas who told him that the petition had been filed and "heads were going to roll over this one." Within 2 or 3 days later, Barnett came to relieve Senff and the captain from boat duty, Barnett told Senff that when he was in the garage with Wlas that day, Wlas told him that Hudson had learned of the petition filing and Hudson said that "heads were going to roll." Barnett told Senff that Wlas told Barnett he had "better keep his nose clean." It is unclear in what capacity Barnett was serving on these occasions.

h. Craig "Buzzard" Nelson—paragraph V(i)—threats

The evidence supporting the balance of allegations in complaint paragraph V concerning Pilots Nelson, Arnold, and Couch rests on the sole testimony of alleged discriminatee Karl Senff. Senff's credibility is not the easiest issue to resolve. His testimony with respect to numerous conversations was very detailed and, despite the complexity of facts involved, preponderantly consistent and coherent, more so with respect to the paragraph V allegations than to the facts of his discharge. As to the latter issue, he was less spontaneous and at times evasive. At times, he candidly acknowledged his bad tardiness and absenteeism record. Yet, in cross-examination, he evasively attempted to evade the impact of some damning admissions made in his pretrial affidavit. His most significant credibility problem then related to his discharge circumstances.

With respect to demeanor, Senff was extremely fluent, spontaneous and projected sincerity and conviction. In a sense, the danger with such a witness as Senff is that he might be discredited because he was too good a witness, i.e., too good to be true. Overall, he survived an exhaustive cross-examination without general impeachment on paragraph V allegations. There is no evidence that Senff, a young man, had, during his brief work history, engaged in either professional or amateur theatrics. Nor is there any evidence that he was planted by the Union in Respondent's employment for the purpose of organizing on its behalf. He was not contradicted when he testified that he had no interest in organizing any of Respondent employees except deck hands.

Respondent argues that Senff was too clever by a half when he allegedly tried to sprinkle his testimony with little peripheral observations such as Nelson's alleged desire for sugar in his coffee. Respondent elicited testimony from Nelson that he rarely drank coffee and did so without sugar. However, such testimony resolves nothing and merely raises another head-to-head credibility issue unresolved by corroboration for either witness. But yet, I agree with Respondent that there was a certain slickness to Senff's testimony and demeanor that raised cautionary warnings. Furthermore, he, like Bradley, engaged in covert tape recordings. Yet, there is no corroborating tape recording. However, Senff may have done less tape recording than Bradley, and it is not clear that he taped all the conversations with pilots and that what he did record was audible. He did tape conversations with Hudson, the dispatchers and one with pilot Couch in the crew change vehicle.

The first credibility resolution between Senff and Respondent's remaining paragraph V alleged perpetrator witness is the easiest to resolve, i.e., Nelson. That witness was clearly in a state of discomfiture when being examined by Respondent's counsel after glaring and almost contemptuously sneering at counsel. Although not revealed by the typed record, his testimony seemed to have been pulled out of him. He was very evasive on direct and cross-examination as to just what he discussed with union agent Yockey at their encounters in taverns or "inns" where Yockey bought him a beer. When pressed by Respondent's counsel as to what they talked about, Nelson smirked and answered, "It wasn't about astronomy." He admitted to certain parts of conversations he had with Senff but did not categorically deny the critical portions, often testifying that he recalled no such statement. He admitted he told Senff not to trust him but he could not recall the context. When denials were elicited in the absence of a detailed recollection of what was said, Nelson responded with very weak, uncharacteristically subdued, unconvincing one-word denials. He testified that Senff asked him to tape record one of the pilots' meetings and he told Senff "sure," he would do so. Then he testified that at a pilot meeting, he placed the tape recorder openly on the table and was then told by Hudson that it was not needed and he shut it off. He testified that the next day, he told Senff that he had nothing on the tape and that because he would not do that to Senff, he therefore would not do it to Respondent. He did not explain why he agreed to it in the first place.

On balance, Senff was the more convincing witness who was not effectively contradicted. It is also consistent with uncontradicted testimony regarding statements by Jim Hackworth. Accordingly, I find that the following occurred.

As Nelson testified, the deck hands, including Senff, were "all ears" as to what transpired at the February pilot meetings with Dolin and Hudson. It was this occasion on Nelson's return to the boat when Senff asked him how the meeting went. Nelson gave him an enigmatic answer. Senff asked him to explain. Nelson said he did not want to talk about it. He also said:

> We don't know what is legal to say and what is not legal but watch your ass.

Senff again asked him to explain. Nelson told Senff that "they are looking to fire you" and "just watch it." Nelson told Senff not to trust him. The next day, Nelson told Senff that he, Nelson, was now "management" and he had to be careful what he said about Respondent's actions pending the election result. However, Nelson told Senff that if the Union won the election, the deck hands would immediately lose their 401(k) savings plan, lose their insurance, lose travel pay and be compelled to pay for safety equipment. However, he said, if the Union lost,

Respondent was talking about giving the deck hands a 9-percent raise.

Respondent argues that it is unlikely that Nelson would have first refused to talk to Senff about the Union but then suddenly threaten him. However, I find it in accord with Nelson's inconsistent behavior as, for example, agreeing to tape record the pilot meeting and then admonishing Senff about the underhanded nature of it thereafter. Moreover, it is not unusual for certain people to preface their statements with a "I really can't tell you this" disclaimer but proceed to do it anyway. Nelson's testimony became more improbable when he claimed that Senff may have said something to him about Respondent eliminating benefits if the Union won the election. As noted his denials were half-hearted and he failed to give his version of the context of what was said. Thus I find that on the foregoing occasion in February prior to the election, Nelson threatened Senff with discharged, impliedly because of his union activities, and also threatened the loss of the aforementioned benefits if the Union won the election but promised a pay increase if it lost.

i. Alvin Ballard—paragraph V(c)—strike inevitability; threats; promises; interrogation

Alvin Ballard had been a licensed pilot for 10 years following 2-1/2 years as a deck hand and served, inter alia, on the Lorna Hackworth with Nelson and Jim Hackworth. He admitted having had a preelection conversation at a local bar with Senff wherein the subject of union representation was discussed, which is the basis for this complaint allegation. Although Senff confused the names of the bars, it is clear that conversation took place at the Main Inn. Senff's fixing of the date as the same date as Eaker's suspension is uncontradicted. They both agree that two deck hands, Grossman and Waters, were nearby, either coming or going, or drinking beer, talking or playing pool. There is no corroboration for either witness.

Ballard had attended two pilot meetings in February with Partridge, Nelson, Thomas, and pilot Mark crew. He followed the instructions regarding distribution of Respondent's campaign literature by placing it on the boat. He testified that he understood it was his duty as a pilot to actively campaign against the Union. Prior to encountering Senff at the Main Inn, Ballard had visited the Crazy Rock Bar where he bought beer for Grossman and others.

The overly smooth, if not "slick," nature of Senff's testimony that somewhat bothered me, I also encountered in Ballard. Both were very fluent narrators. Ballard was very quick with his responses and perhaps too quick. On cross-examination, he was not as freely responsive as Senff on this issue, but rather he tended to hesitate with a guarded demeanor. Ballard admitted to having discussed many of the topics identified in Senff's testimony. His selective recollection of the actual substance of the discussion is no match for the free flowing, vivid narration by Senff, and thus I find Ballad's solicited categorical denials of critical portions to be less convincing. I credit Senff and find that the following conversation occurred between himself and Ballard on about February 26 at the Main Inn at or near the bar.

Senff entered the Main Inn at about 7 p.m. and first encountered Ballard at the front door. He then pursued a fragmented conversation with Ballard over a 3-hour period over drinks and probably some pool playing.

Senff raised the subject of Eaker's suspension which he speculated was because Eaker was not sufficiently antiunion. Senff told Ballard he had heard that Ballard was buying beer for deck hands to influence their votes, which Ballard denied. Ballard then asked Senff "how does it look," how does he think the deck hands will vote. Senff responded that it looked "pretty good" and they will probably vote "yes." Ballard then responded that "it just won't work," and that the Union had tried unsuccessfully many times before to represent Respondent employees. Senff volunteered his opinion that he thought it would be a good thing. Ballard said he had been represented by a union in prior employment situations and that it was a bad experience. Senff answered that it probably had been an inadequate union whereas the ILA was an effective union. Ballard retorted that all unions are the same, i.e., high dues and they negotiate contracts with benefits less than what employees already possessed. Bradley suggested that they talk "off the record—man to man" privately and put Respondent and the Union "off to the side." Senff agreed. Ballard said that Respondent would not negotiate a wage and benefit increase because it is now paying the maximum it can afford; but that if it did agree in negotiation to a wage increase, it would have to eliminate some benefits to pay for it such as free coffee, work gloves. He said Respondent could start "off the bat" at the bargaining table without those benefits in the proposed contract. Senff responded that he understood that that was the bargaining process (i.e., everything is negotiable).

Next, Ballard told Senff that it was bad timing to proceed to an election because of the forthcoming scheduled canal lock closure for maintenance during which there is no barge movement. Ballard said that if the deck hands voted for the Union, Respondent would be able to stall negotiations until the lock closure, lay off all employees and legally rehire new employees of its choice because of the lock closure. Ballard insisted that the Union would necessarily order a strike. Senff insisted that it would be the decision of deck hands whether to strike or not. Nevertheless, Ballard insisted that there would be a strike during which it would hire temporary employees who would be converted into permanent employees. Ballard further stated that if picketing occurred, Respondent would pick up crews for its boats at National Marine and close its doors, dissolve and merge with National Marine or simply switch its name under the same ownership. However, Ballard said if the employees rejected union representation, it was ready with a 9-percent pay raise, but he "can't say that." Senff said he understood that Ballard could "not say that." Ballard further promised that Respondent would "do something" about overtime compensation, lower the rate of health insurance and improve the benefits.

The conversation continued with Ballard's prediction that union representation "just won't happen" because there were too many ways for Respondent to make the election ineffective or simply not occur. Ballard asked Senff what he personally expected to get out of the Union. Senff answered that he did not know and did not think the Union would do anything special for him. Ballard retorted, "Come on you are doing all this work for them; you are running around with these guys here getting the cards, doing all the work—they have got to be doing something for you." Senff denied it. Ballard said, "they better do something for you . . . because you're going to need something—Good luck with the Union and your new job." Senff said "okay, I'll try to get a job with them. If I lose this job at [Respondent] if they fire me . . . I will try."

Ballard next asked Senff whether he and other deck hands thought they deserved a pay raise, and when he responded they did, Ballard said that Senff and some deck hands like Bradley and Grossman were good deck hands but some new ones were "not worth shit" and were lazy. The conversation ended with further discussion of Senff's self-perceived worth.

There was no evidence submitted in support of complaint paragraph V(b) relating to Ballard.

j. David Couch —paragraph V(d)—threats; promises; futility of representation; strike inevitability; impression of surveillance

David Couch has been a pilot for over 10 years. His regular boat was the Chris White. As of early 1995, his regular deck hands were Karl Senff and Ed Blatnicky and occasionally Bill Vaughn. Indicative perhaps of Couch's mind-set toward the union organizing was a three-way riverboat radio conversation between Couch, Barnett, and Thomas shortly before the election, as overheard by Senff. Thomas and Barnett's denials are unconvincing. Thomas could not recall it. Barnett on this point very weakly claimed he did not remember it. Couch did not recall it but admitted that what was alleged to have been said by him sounds like something he would have said. I credit Senff. Barnett stated, "I don't know, it looks like the deck hands will vote for the Union." Thomas said that he hoped not or otherwise "we'll all be looking for jobs; I guess I'll have to go to National Marine and get a job." Couch said he did not care because he owns a pool hall in Ottawa (Illinois) and he was "all set." Thus, although the conversation reveals specific fear by Thomas of Respondent's general retaliation to a union victory, thus corroborating testimony of relayed threats of same, the conversation also reveals an almost jocular indifference by Couch.

Senff's account of his conversation with Couch was nowhere near as detailed, spontaneous, and free flowing as it was with respect to union election related conversations with other pilots. He said he had over 30 conversations with Couch as they worked together and talked daily in the wheel house on the Chris White from late January up to his suspension. He testified that the Union was referred to in these conversations after the representation hearing until he was discharged, and that they were "redundant" and repeated "over and over again." In cross-examination, he testified that with respect to the 30 or 40 conversations with Couch, he could not recall how they get started but admitted that he did initiate some of them. He could not recall how he started those conversation and he could not recall if it were he who asked Couch about the Union. Senff's synopsis of what Couch allegedly said about the Union is fragmented, selective, lacking specific context and appears to be a composite of what was allegedly said over the duration of time or at least in two or more conversations. Furthermore, it is particularly self-servingly geared to a detailed Respondent plan to eliminate Senff on the pretext of his tardiness record. The circumstances of his tardiness discharge is the area of Senff's greatest credibility weakness. With respect to Couch's alleged comments, I found Senff to have lacked the certitude and convincing spontaneity discussed elsewhere. Furthermore, I find his testimony of the disclosure to him by his supervisory plot of a very detailed plan to discharge him to be improbable and unconvincing in the context of Couch's admitted concern for the real impact of Senff's tardiness upon his work performance.

As a witness, Couch was very impressive. He exhibited certitude, confidence, ease, and spontaneity both in direct and cross-examination with minor exceptions. I credit his denials that he questioned Senff. Even in Senff's version, Couch merely asked Senff if he thought that the deck hands would vote for the Union. I credit his denials that he threatened the closure of the business, the inevitability of a strike, the subcontracting of unit work, the transfer of work to National Marine, that Senff was number one on the "hit list," and that Respondent had a specific plan to write up exactly three reprimands and discharge him exactly as it had discharged Eaker. I credit that part of Senff's testimony that Couch repeatedly told him to report for work on time. I also credit Senff that Couch told him to go down and to tie up a line, i.e., perform a work task or he would be pushing ILA pencils on a street corner, at which point Senff jokingly called Couch a "mean boat manager" Couch, in effect, admitted the incident. Both witnesses characterized the episode as a joke. It is Couch's uncontradicted testimony that he and Senff frequently joked about Senff selling ILA pencils on the street corner and that he told Senff that he ought to "straighten up" or he would end up doing that. Furthermore, Senff was so at ease in joking with Couch that he pinned ILA materials on Couch's coat and placed an ILA pencil in his coat pocket, which Couch only later discovered to his embarrassment when he walked into Hudson's office. Senff placed ILA magnets all over the boat and wore ILA handouts. It was in that context that the pushing ILA pencil jokes were made. Accordingly, I find Couch's comments were not coercive. My crediting of Couch's testimony regarding his conversations with Senff relating to Senff's absenteeism and tardiness logically lead to the next area of discussion, i.e., allegations of discriminatory discipline and discharge starting with Senff.

4. Discriminatory discipline and discharge—8(a)(1) and (3) allegations

a. Karl Senff

Based in part on the credited testimony of Couch, the following confrontations occurred between Couch and Senff, much of which was not explicitly rebutted except for the inconsistent, discredited testimony regarding the unlawful discharge plan.

Senff started decking for Couch in late 1994 or early 1995 on Couch's request that Senff transfer to his boat, the Chris White, to replace a deck hand who failed to report for duty. Couch testified that at first Senff was frequently tardy but not as much so as Couch had observed when Senff reported for duty with pilot Larry Turner during an earlier assignment in the later part of 1994. It is undisputed that Senff told Couch that he felt entitled to report late in self-compensation for the late relief he received when his own shift had previously ended. Couch testified further that from March to April 1995, Senff had improved and was not tardy as much but that toward the end of that period, he reverted to his practice of reporting late for his shift by 15,-20 and 30 minute increments. During the period after Senff received his first written warning on January 20 from Hudson which threatened possible discharge for absenteeism/tardiness, Couch told Senff that he, Couch, did not want to be forced to wait idle at the dock until Senff finally arrived and have to lie to dispatcher Wlas regarding Senff's tardiness. Senff then again argued that he felt entitled to be late in self-compensation for working beyond his previous shift. Couch told him "to do what he felt" and "to take your actions that you are going to take."

After Senff's second written warning for tardiness of February 9, for tardiness or absenteeism which again threatened possible discharge, Couch discussed it with Senff and told him that he could not continue being late. Senff protested again that he would continue to be late in self-compensation for being relieved late. Couch told him that if he continued being late, he would probably end up being discharged for tardiness. Couch testified that he did not want to lose Senff as his deck hand because he did a good job and was a willing worker "as long as he was on time." For reasons already discussed, I credit Couch's denial of Senff's testimony that upon tendering written warnings to Senff, he, Couch, said "strike one," "strike two," etc. and that he would get three strikes and be out or discharged. Couch testified as did General Counsel witness Brock that no deck hand was as tardy as Senff. Senff himself conceded it in a pretrial affidavit. His evasiveness and unconvincing, disingenuous attempt to extricate himself from that admission in cross-examination severely undermined his credibility as did his abashed and flustering demeanor when he tried to explain away that affidavit testimony. Why Senff bothered to renege on that affidavit testimony is unclear because earlier he admitted that he was more frequently tardy than any other deck hand for a year's period up to his discharge.

As noted above, Senff conceded a preunion petition history of absenteeism and tardiness of, at times, up to one-half hour. He did not rebut and contradict Couch's testimony above except as to the "strike one" characterizations of the reprimand. He admitted that Couch told him that he had to come in on time. He also admitted that during the preelection petition period, dispatcher Wlas rejected his argument that he was entitled to be tardy whenever he had been relieved late in his previous shift. As noted above, he had been "hollered at a lot for tardiness" by lead dispatcher Wendell Hackworth and warned numerous times by dispatchers to get in on time starting 3 months after he started his 2-year tenure with Respondent and continuing up to the election. He admitted that on a date prior to January 1995, dispatchers Wlas and Herkel "verbally abused" him about his tardiness and that Wlas on one occasion even told him he was discharged because of a failure to report for work 1 day by saying "don't bother coming back." Wlas, however, later relented. He admitted that Pilots Jim Hackworth, Nelson, and Couch verbally warned him numerous times about his tardiness. In redirect examination, Senff implied that it was only after the petition filing when pilots told him not to be tardy or absent. He did not try to renege on his admissions of pre-January 1995 warnings by Hudson and the dispatchers.

In cross-examination, Senff was evasive as to the practical significance of deck hand tardiness, claiming disingenuously that he did not know the effect of it on a boat's departure and, finally, he admitted that there were "a few times" when boats had to sit and wait for his arrival and also occasions when he was so late, the boat departed without him and he was sent home.

Prior to working for Couch, Senff decked for Pilot Larry Turner. Except for denying that Turner ever told him he wanted Senff off his boat, Senff did not rebut the testimony of Turner whom I credit. Senff was excessively late for Turner during the period from July to August 1994 on the Captain Hackworth. On three occasions, Turner warned Senff that he had to be on time or that "action would be taken" but Senff reacted indifferently and continued his tardiness. Turner complained to Wlas and urged that Senff be fired. Wlas told Turner to do what he wanted. Upon coming late, Turner told Senff he was fired. However, after that, Senff returned to work for Couch and others, including a later occasion for Turner.

Senff admitted that he had no idea of how many times he had been tardy and admitted being intentionally tardy. There is no effective challenge to the justification for Respondent's conclusion that Senff persisted in his practice of tardiness and absenteeism as of January 20, the date of the warning issued by Hudson upon Pilot Turner's complaints. Senff continued to deck for Turner on sporadic occasions. On January 10, he was tardy for an assignment to Turner. Brock testified that Senff "tried" to improve after the first warning. The basis for this conclusion is not clear. Even Senff did not so testify. With respect to the February 9 warning letter, Senff testified that he had been 20 minutes late but that he had forewarned Wendell Hackworth of a "court date," i.e., a daytime appointment. Senff was thereafter scheduled to work at night the week of his court date. However, on the court date, he called Wendell Hackworth to ask him for that very night off but was told to come in anyway. Thus he was 20 minutes late.

It is undisputed and conceded by Senff that he was again tardy on March 3, 4, and 20. Thus he received his third warning from Hudson. The prior warnings threatened discipline "up to and including discharge." The March 20 letter threatened dismissal for "any further incidents of tardiness." That warning was personally delivered by Hudson who had driven his vehicle to the point on the river where Senff was working on a barge.

The General Counsel concedes that the crew schedules (G.C. Exh. 39) can be cited to demonstrate Senff's poor attendance record but argues that the exhibit is unreliable because of numerous cross-outs and white-outs and lack of complete authentication. I agree. Even the Respondent does not rely on those schedules in its brief. However, the General Counsel is left with credited, competent testimonial evidence which does not support the argument that Senff significantly abated in his undisputed poor attendance/tardiness record except for Couch's generalized impression of some improvement for the February–March period but regression at the end. The testimonial evidence indicates rather that Senff persisted in his practice of intentional tardiness up to the date of discharge on April 9.

Senff was suspended on April 9 and formally discharged on April 19 for tardiness on Sunday morning, April 9. Senff testified that it had always been his practice to start his shift by arriving at the Lemont facility at 6:30 a.m. and he did so on April 9 and walked directly from his parked vehicle 300 feet to the boat, Chris White, and he stowed his gear in the galley, went to the engine room to perform engine related checks and then to the wheel house where he encountered Couch on the cellular telephone. According to Senff, Couch referred him to the telephone to speak to Wlas who told Senff he was suspended for being tardy that morning.[10] After some banter with Wlas over whether he would be paid that day, Senff testified that he departed, retrieved his gear, changed out of his rain gear, started to walk to his vehicle, returned to the boat for his forgotten car keys in the galley, proceeded from the boat at about 6:45 a.m. and saw deck hand Tim Waters walking toward the boat. At his vehicle, Senff said he saw Ballard at 6:47 a.m. walking to the boat. Senff testified that he then drove to the H

[10] Couch corroborates Senff that it was Wlas who told Senff on the telephone that he was suspended. For some reason, Wlas testified that it was Couch who informed Senff. Couch is the more credible version.

& H Restaurant in Lemont which he claimed was a 10-minute drive away "if you book [sic]." Hudson's uncontradicted testimony is that the distance is actually 2.8 miles by either of two routes and partially by gravel road. He also testified that he had timed the drive in four test trips with a standard American-built car and it ranged from 4 minutes, 35 seconds to 6 minutes, 25 minutes, including times of heavy daytime traffic. Yockey testified he drove that distance 15 times at no less that 10 minutes. In cross-examination, he nullified this testimony by admitting that he never specifically timed himself nor did he measure the distance. Yockey testified that the road was in disrepair and bore heavy truck traffic which slowed him to 30 miles per hour. However, the heavy traffic is unlikely at 6:45 a.m. Sunday morning.

Senff testified that he telephoned the union attorney at his home. He identified his Ameritech telephone bill which set forth an April 9, 6:55 a.m. telephone call from "Lemont" charged to Senff's telephone calling card number. Of course, the Lemont number identified is not specified as to exact location in the Lemont telephone service area which could very well have been at or near the dock facility. Further, it depends upon Senff's testimony for location as to a pay phone at the restaurant, as does the fact that it was he who used the charge card and not someone else to whom he had lent it.

Hudson was not involved in the decision to suspend Senff as he was out of town on Sunday, April 9. He testified that he returned to Lemont on Monday and was informed by Wlas and Couch of Senff's Sunday tardiness episode. Hudson questioned Wlas, Emily B deck hands Toby Taylor and Braden Graddy who, he testified, corroborated the tardiness report. After some preliminary conversation and a confusing mistake in one letter to Senff from Hudson referring to the date of tardiness as April 8, he and Senff finally communicated by telephone on March 17. Hudson testified that he cleared up the confusion but that Senff denied tardiness on Sunday morning, April 9. Hudson testified that Senff cited as corroborating witness, deck hand Jim Perry. Hudson testified that he later interviewed and obtained a statement from Perry who claimed that although he was present Sunday morning, April 9, he did not observe Senff. Hudson testified that he decided to discharge Senff because Senff had the worst attendance record and that he was not motivated by Senff's union activities, knowledge of which he never denied.

Senff testified that during his last telephone conversation with Hudson, he was under the impression that Hudson was referring to Saturday as the date of tardiness and that he was never informed by Hudson that it was Sunday tardiness for which he was accused. Unlike Hudson, Senff did not give his version of the details of the telephone call nor did he categorically deny the balance of Hudson's version. In a Monday, April 10, conversation at the Lemont facility where Senff had gone to retrieve his boots, he conversed with Couch and when, asked why he was tardy, he denied being tardy for the entire 5-day period up to and including Sunday. Senff claimed he was still under the impression that Couch was referring to Saturday. Senff admitted that in his pretrial affidavit, he testified that Couch asked him on Monday why he was tardy "yesterday," i.e., Sunday, and he responded to Couch that he was not late that day. I credit Hudson's more detailed and more certain version of that telephone call and discredit Senff's inconsistent, generalized, unconvincing testimony about the telephone conversation with Hudson. Furthermore, it is inconceivable that Senff would not have specifically referred to Saturday in that conversation. In any event, he denied tardiness on either day. Senff testified, however, that it was Saturday, April 8, that Perry saw him arrive and that is why he identified Perry as a witness and also why Perry could not corroborate his punctuality on Sunday. Of course, if Senff later discovered that Perry could not corroborate him, it is a motivation for insisting that he was under the impression that Saturday was the critical date when he cited Perry to Hudson. Significantly, Senff did not try to reargue Hudson's decision after he was discharged explicitly for tardiness on Sunday, nor did he thereafter cite to Hudson corroborating witnesses for Sunday.

Bradley testified that he was present in the facility parking lot inside Respondent's crew vehicle in the presence of Nathan Harper on April 9 when they observed Senff arrive 2 minutes late at 6:32 a.m.[11] Bradley testified that he was looking at the clock at the time and predicted to Harper that Senff would be fired and that Harper protested, "no get out of here, he's only two minutes late." Bradley testified that he "knew they were fixing to fire Senff" so he "immediately went upstairs" to the office where, at 6:40 a.m. on the office clock, he claims he engaged Wlas in conversation when Bradley complained that his pilot Ballard was late. Bradley testified that he had to awaken Ballard in his trailer nearby at 7 a.m. His testimony was contradicted by Wlas and Ballard.

Senff, who testified that he arrived at 6:30 a.m. on Sunday, also testified in cross-examination that upon his arrival, he observed vehicles already parked and others arriving. He identified Couch's vehicle. In addition to Waters and Couch, Senff claimed he saw Ballard that morning at 6:45 a.m. walking toward his boat. If Bradley is correct, this could not have occurred until after 7 a.m. But Senff testified that only 15 minutes elapsed from his arrival to the point of suspension notification. The only other persons identified by Senff as having been seen by him or whose vehicles he identified was a newly hired deck hand Bill (Brick Eater) who was in the wheel house with Couch to stay out of the rain.

Senff did not claim seeing either Bradley or Harper or their vehicles as having been present that morning. Nathan Harper testified as a General Counsel witness but significantly he was not called upon by the General Counsel to corroborate either Bradley or Senff.[12] In view of Bradley's already eroded credibility and the inconsistencies of his uncorroborated testimony, I discredit him further and credit the contradicting testimony of Wlas and Ballard, i.e., that Wlas had no such conversation with Bradley and that Ballard was not significantly late.

Couch testified that he was waiting and watching for Senff to arrive which he did at between 6:40 to 6:45 a.m., that Senff proceeded with lunch pail and raincoat directly to the boat because Couch called out for him to do so, and that he escorted Senff directly to the wheel house where the call was placed to Wlas in the office at about 6:45 a.m. according to the pilot house clock to which Couch pointed. Deck hand Waters was transferred from the nearby Captain Hackworth to substitute for Senff. Wlas corroborated Couch.

Braden Graddy corroborated Wlas and Couch. Graddy is a relatively new, very young deck hand, only employed by Re-

[11] Inexplicably, Bradley at first testified that he started looking for Senff at 6:35 a.m. and thereafter encountered Harper.

[12] Payroll records indicate that Harper was assigned to the Captain Hackworth but did not work on April 8 or on April 9.

spondent for 5 months. He testified that he worked with deck hand Toby Taylor on April 9 on the 6:30 a.m. to 11:30 a.m. watch and that after he finished cleaning the galley, he had proceeded to the wheel house with Taylor where on the deck, at 6:45 a.m., they both observed Senff walking toward the boat from the parking area. Taylor remarked that Senff was late again. Respondent did not present Taylor as a witness who, it claims, had undergone knee surgery in Arkansas during the week Respondent's defense was presented. Graddy proved to be a fluent, relaxed, confident, and most convincing witness. I found him to be very credible.

Senff's testimony was afflicted with inconsistencies and improbabilities. His aborted corroboration by the discredited Bradley raised more inconsistencies. Harper was silent and thus did not corroborate Senff and Bradley despite his testimony as a General Counsel witness. Ultimately, the telephone charge bill does not dispositively corroborate Senff because of the limitations noted which rest on Senff's credibility. Moreover, Hudson's estimate of the driving time to the restaurant is not effectively contradicted, assuming the 6:55 a.m. call was placed from that restaurant by Senff. Finally, Senff's demeanor throughout testimony regarding the subject of his tardiness and discharge lacked spontaneity, certitude, and conviction most particularly when attempting to explain any inconsistent testimony.

Based on the foregoing evidence, I credit Respondent's witnesses as to the tardiness and absenteeism record of Senff and as to the events leading to his discharge on April 9, 1995. However, I do not necessarily conclude that Respondent was not motivated in whole or in part because of Senff's union activities. Thus far, I merely conclude that Senff was as bad as he was portrayed with respect to attendance and punctuality and he persisted in that performance at times of the written reprimands and was tardy on April 9, 1995, as testified to by Respondent witnesses. Analysis will be made hereafter, based upon the whole record, whether or not Senff's misconduct was a pretextual reason for his discharge or whether he would have been discharged notwithstanding his misconduct had it not been for his protected activities.

b. Steven Bradley

1. The written reprimand—paragraph VI

On March 27, 1995, Hudson caused a written reprimand to be issued to Bradley for covertly attempting to tape record a conversation between Bradley and Hudson on March 24. He was warned therein that "failure to comply with this [order to desist from covert recordings] or any violation of other company rules and policies will result in further discipline up to including discharge." It is undisputed that Bradley did attempt to secretly tape record a conversation between himself and Hudson on March 24 at the Lemont facility office concerning Bradley's questions about the 401(k) plan. Hudson discovered the tape recorder in Bradley's shirt pocket when his coat opened. Hudson became indignant and accused Bradley of secretly recording the conversation. Bradley at first denied the conduct, according to Hudson, but confessed a few minutes later and broke down emotionally, apologized and tearfully explained "they made me do it" and that he was "tired of this union crap." According to Hudson, Bradley told him that he had heard that he was on Hudson's "hit list," but that Hudson assured him that there was no such list and he accepted the apology. Hudson testified that he was unaware of any such prior similar conduct by an employee. There is no evidence of such conduct prior to January 1995. Bradley's version of the incident closely tracks that of Hudson. He does not explicitly deny any part of it although he claims that the explanation he gave for the secret tape recording was that he heard a rumor that Hudson had a "hit list." In view of Bradley's credibility weaknesses already noted, his uncertain demeanor and his failure to categorically contradict parts of Hudson's testimony, I credit Hudson's version where any difference exists. Furthermore, I find Bradley's credibility to be so poor that I hereafter discredit it wherever it conflicts with the inconsistent testimony of Respondent's witnesses except where otherwise noted. With respect to the circumstances of Bradley's termination, Respondent's witnesses Hudson, Barnett, Carver, Ralph Guilliams, and Thomas were far more detailed, spontaneous, consistent and convincing. Barnett was particularly fluent, vivid, and detailed in his narration of the events of April 15, 1995. I have already noted the crediting of contradicting testimony of the police officer who was called to the site on April 15.

2. The April 15 suspension and May 9 discharge—paragraphs VI and VII(f), (g)

The servicing of the Crawford Station facility started early in 1995. It is described as a difficult assignment for a single deck hand because the dock is 12 feet above the water and requires caution and effort to ascend and to fasten a line. Brock worked that dock 15 to 20 times. Bradley worked it six or seven times alone for Respondent and eight times for a previous employer. Brock testified that all deck hands complained about it and that he drafted a letter of complaint to Hudson which Bradley and he presented to Hudson 1 week after the election.[13] The thrust of the complaint was that because of its safety hazards, two deck hands should be assigned the task. Bradley complained to Hudson that only prounion deck hands were assigned. Hudson's admitted reaction was to claim lack of sufficient deck hands' availability, to deny that antiunion motivation was involved in such assignment but promised to "check it out." Crawford Station is part of the normal run for that route; serviced by the Lorna Hackworth, Ann G, Chris White and Emily B boats. Hudson also promised that when sufficient deck hands are available, he would assign two deck hands to the Crawford Station servicing boat.[14] It is Hudson's undisputed testimony that after the conversation, he discussed Bradley's accusation with the dispatchers and reviewed the assignment sheets which revealed to him that the Lorna Hackworth had not serviced Crawford Station exclusively but indeed had made runs there. Bradley had been assigned to the harbor boats immediately after the election at his own request.

Bradley had been involved in a work-related back injury on March 9, 1995, unrelated to these proceedings. It is undisputed that deck hands frequently threaten pilots that they will sue Respondent for injuries suffered in difficult assignments.

On about April 11, 1995, deck hand Mark Carver had occasion to take an evening meal with Bradley and Barnett at the H

[13] Bradley testified that it occurred a few days before his April 15 suspension after Senff was discharged. The letter is undated.

[14] The conversation is not alleged to be violative of the Act. There is no allegation or evidence that prounion deck hands were discriminatorily assigned to the Crawford Station run despite Bradley's assertion. In cross-examination, Bradley admitted that the Emily B normally serviced Crawford Station regardless of the union sympathies of deck hands assigned to it.

& H Restaurant in Lemont where they were joined by Jerome Estes. Bradley and Estes engaged in a discussion regarding the Will County dock which, like Crawford Station, is considered dangerous to service. Bradley mentioned "taking a spill." Carver was not clear as to the context of that statement, nor what precisely Bradley said about "taking a spill."

During the week preceding April 15, Barnett overheard Bradley, in the Lemont crew quarters lounge, tell deck hands Pierce, Brock, and Senff on several occasions that he would refuse to service Crawford Station.

On April 15, 1995, Bradley was at the Lemont crew quarters when, at about 6:15 p.m., he learned from Pilot Barnett, in the presence of Pilot Ralph Guilliams, that according to the night orders just issued, Bradley was to service Crawford Station alone during his shift which was to start in 15 minutes aboard the Lorna Hackworth under pilot Dale Thomas. Bradley told Barnett that he would not perform the Crawford Station work. Barnett asked if he was refusing the assignment. Bradley answered "No, I am not going to refuse, I will do it . . . I will just take a spill off the dock, claim a back injury . . . and [Respondent] will have another law suit." Barnett asked if he was serious. Bradley merely laughed and walked out. Barnett and Guilliams left the crew quarters and proceeded to board the Ann G to socialize with pilots Pattin and Tucker. Thereafter, Barnett and Guilliams were debating whether Bradley was serious. Couch entered and was told about Bradley's statement. Couch demanded to know what Barnett intended to do about it. Barnett said he would contact Thomas who was Bradley's assigned pilot but Couch insisted that instead, they call Hudson. Barnett protested that such action was "not necessary." Couch insisted that it was. They then left the Ann G, boarded the Chris White where, after an unsuccessful attempt to reach Hudson, Couch reported the incident to dispatcher Wendell Hackworth. Barnett and Guilliams confirmed it. Hackworth told Barnett he would call Thomas aboard ship and have him suspend Bradley until Monday. Hackworth ordered Barnett to call the appropriate county police.[15] Hackworth told Barnett that he did not know how Bradley would react and he wanted the pilots to remain at the facility to prevent any vandalism. In any event, Bradley was suspended without incident and the arrival of a county police officer, an unprecedented event for a suspension, proved unnecessary. In order to suspend Bradley, his boat, which had already departed, had to turn back to dock where three other boats remained docked and a variety of pilots and crew awaited Bradley's arrival which took 45 minutes to 50 minutes. There is no explanation why three other boats had not departed as they normally would have except for Hackworth's unfounded fear of "vandalism."

Thomas received the call from Wendell Hackworth to suspend Bradley when their boat was about 2 miles from the facility. Hackworth told Thomas that he wanted Bradley "off the boat" because of a threat to fake an injury and sue Respondent. Thomas protested to Hackworth that Bradley was a "very good deckhand" and that he, Thomas, did not want "to see this happen to him" Hackworth responded that his word "was final."[16] Thomas put Bradley on the telephone at Hackworth's order. He heard Bradley's part of the conversation, i.e., he heard Bradley say that he had been "only joking" and "I will do it for you." His failure to recall that Bradley may have said something else to Hackworth does not constitute an effective contradiction of Senff in the absence of testimony by Hackworth.

When Bradley hung up, Thomas told him not to worry, to remain calm and to do what he was told, i.e., to leave the boat. Wendell Hackworth testified only briefly and for the General Counsel as an adverse witness. Though he was under control of and at Respondent's disposal, he was not called to testify for Respondent. I must therefore infer that had he testified, he would not have been able to contradict Bradley's testimony of that suspension conversation. *International Automated Machines*, 285 NLRB 1122 (1987), enfd. 861 F.2d (6th Cir. 1988). I must therefore credit Bradley as to what Hackworth told him.[17] Hackworth recited the reported threat and told Bradley that he was suspended until Monday, that he was to be put off the boat, that he had two more deck hands waiting to do the job, and that the police would be waiting for him. Bradley demanded to know if the suspension was caused by his union activities. Hackworth snapped:

> You are f—g right, you go cry to your ILA buddies and see what they do for you.

It is Bradley's uncontradicted testimony that two deck hands boarded the boat after he was put off.

On Monday, September 17, Wendell Hackworth reported the April 15 suspension to Hudson and was later corroborated by Barnett and Guilliams. On Tuesday, Hudson interviewed Bradley about his alleged threat to contrive an accident injury and to sue Respondent. Bradley gave a strange response. He stated he had been fatigued from excessive work. Then Bradley stated, "[I] don't think I did—I'm not sure; I think I did; I am sure I did, but I say a lot of things; no I did not." Hudson pointed out to him that he had just admitted that he did.[18] On May 19, 1995, Hudson notified Bradley by letter of his termination.

Thus I conclude that Bradley did in fact make the alleged threat under the foregoing factual context. There is no evidence of comparable past misconduct in any way similar to that of Bradley. The question to be resolved hereafter is again would Bradley have been suspended and discharged regardless of his known union activities.

c. Written warnings to Grossman and Vaughn—paragraphs VI and VII(h), (I)

Neither Vaughn nor Grossman testified. The complaint alleges that the written warnings issued to these employees were the consequence of a disciplinary system which had been implemented because of the general union organizing activities, i.e., not necessarily their own activities, and thus were violative of Section 8(a)(1) and (3) of the Act as a general retaliation. It

[15] Officer Sean O'Neill testified that the pilot to whom he spoke accused Bradley of threatening to cause an accident and to sue the Respondent and that there was no reference to union activities except for Bradley's own accusation to him of union busting and a desire to picket.

[16] Compare the preunion activity countermanding by the dispatcher of Senff's discharge by a pilot.

[17] However, I credit Thomas that he heard Bradley also tell Hackworth that he was only joking and that he would do it, i.e., service Crawford Station.

[18] Bradley's discredited testimony fails to set forth a convincing, forthright contradiction.

> I believe I told him my story what happened . . . [i.e., assignment alone to Crawford Station]. I got pissed off [about doing Crawford alone] and I stormed out the door . . . I told him if I said anything that I wasn't aware of it to my knowledge, I didn't say that.

is also alleged that the disciplinary warnings issued to Grossman were specifically motivated because of his own actual or suspected union activities, as were the warnings issued to Senff and Bradley.

The precipitating incident for the issuance of a written warning to William Vaughn on March 29 is undisputed.[19] Deck hand Vaughn engaged in an abusive, insulting dialogue with a high managerial representative of one of Respondent's customers over a trespassing accusation made by that manager regarding a vehicle driven by Vaughn. The General Counsel argues that deck hands often argue with customers at their dock sites. However, those arguments involved disputes with low level customer employees about how Respondent's boats were to be docked. Clearly, Vaughn's conduct was unprecedented as Hudson testified, more personally abusive and involved a high level manager.

On February 10, 1993, shortly after Hudson assumed responsible control over the facility, he issued a written warning to Vaughn because of a physical altercation between Vaughn and pilot Dale Thomas.[20] Thomas was verbally reprimanded for abusive language and Vaughn was more formally disciplined for punching or attempting to punch Thomas. This was the only written warning ever issued by Respondent to any employee prior to January 1995.

It is Eaker's uncontradicted and, accordingly, credited testimony that other misconduct by Vaughn was tolerated as follows. Eaker was hired in mid-1994 as a pilot-captain. At some unspecified date shortly thereafter, Vaughn refused to obey his order, shoved him, and invited a fistfight. Eaker reported it to Hudson who agreed that Vaughn be terminated. However, Vaughn was not terminated but repeated his misconduct to the point where Eaker refused to let Vaughn board Eaker's boat. Hudson countermanded Eaker's order and Eaker was told to put Vaughn to work. In cross-examination, however, Eaker admitted that he had full authority as a pilot to remove a deck hand from his boats upon his own initiative, that he had swapped deck hands with "attitude problems" with other pilots without Hudson's intervention and that ultimately he did not allow Vaughn to work on his boat. Hudson denied awareness of Vaughn's union sympathies. Vaughn signed a union pledge card solicited by Senff early in the organizing effort. Little else is known of his union activities, if any.

With respect to Grossman, it is undisputed that like Senff, he had a poor attendance-punctuality record prior to January 1995 for which he had never received a written reprimand until those issued to him on March 28 and April 11, 1995. It is undisputed that he engaged in the conduct for which he was then reprimanded and thereafter improved his performance. It is undisputed that other tardy deck hands were not issued written reprimands before January 1, 1995. However, Hudson admitted as much, as noted earlier in the discussion above relating to Respondent's historic leniency toward employee misconduct and historic lack of a written warning practice.

Grossman signed a union pledge card on October 10, 1994. Hudson denied that Grossman's union activities were a motivating factor for the written reprimands. He did not deny awareness of those activities. There is no evidence of what other union activities Grossman actually engaged in.

Pilot Jim Hackworth had told Brock during the election campaign that Hudson declined to expend electioneering efforts directed at Senff and Brock because, unlike Grossman and Pierce, it was a waste of time and money. Thus Grossman was viewed as susceptible to Respondent's antiunion representation solicitation. This is confirmed by pilot Jim Hackworth's statement to Bradley that Grossman and Pierce were considered "maybes" who might be convinced to vote against the Union. The only evidence that Grossman was considered to be more strongly prounion is the discredited testimony of Senff regarding a "hit list" conversation with Couch. The inconsistency with the foregoing evidence is yet another reason to discredit Senff on that issue.

In view of the results of the election, the Respondent most probably believed that some or all of the "maybes" voted no. The evidence thus is inconclusive as to whether Grossman was identified by Hudson as a "yes vote" when he issued the post-election reprimands. Finally, with respect to all of the written reprimands issued to Bradley, Senff, Vaughn, and Grossman, there is no evidence of disparate enforcement, i.e., that the same conduct by other deck hands was not subjected to the written reprimand practice after January 1995. If Grossman's reprimands are to be found unlawfully discriminatory they, like Vaughn's reprimand, must be found so upon the first theory, i.e., general retaliation by institution of the written reprimand practice.

E. Analysis

1. Agency issue

There is no dispute that pilots possess and exercise supervisory authority as set forth in the Act. They were considered by Respondent to be supervisors and were charged by Respondent to present its antiunion representation position on behalf of Respondent to the deck hands. The deck hands were forcefully advised of the pilots' function as the campaign representative of Respondent. It was the pilots' expressed instructions to convince employees to vote against the Union. They were given instructions in that task.

In support of its argument that despite their supervisory status, pilots were not acting as agents of Respondents, Respondent cites *National Apartment Leasing*, 272 NLRB 1097 (1984), where, it argues, the Board found that statutory supervisors had no actual authority to make threats and were regarded by employees as speaking as a fellow employee. The Board in that case, however, was not applying the traditional Board precedent regarding the imputation to an employer by statements of its statutory supervisors. Rather, it explicitly applied the "law of the case" pursuant to a remand order of the United States Court of Appeals for the Third Circuit. Even under that criteria, I find that abundant record evidence establishes that pilots had explicit authority to represent Respondent's election views as agents of Respondent. Such a function for purposes of an election campaign could be sufficient to create an agency status even for nonsupervisors. *Propellax Corp*., 254 NLRB 839 (1981); *Tyson Foods,* 331 NLRB 552 fn. 3 (1993). The fact that Respondent's legal counsel instructed the pilots as to the lawful manner of electioneering and they deviated from those instructions, either through intent, misunderstanding or other covert managerial instructions, does not exculpate the Respondent from the actions of their agents. See *Flexsteel*

[19] Vaughn has not reported for duty since March 29, 1995, and is presumed to have quit.

[20] Senff's testimony that no written reprimand was issued lacks a foundation to establish his competency to testify to that alleged fact.

Industries, 311 NLRB 257, 265 (1993). See also *Comcast Cablevision of Philadelphia, L.P.*, 313 NLRB 220, 223 (1993), where the Board ordered a remedial bargaining order based in part upon coercive conduct of supervisors who had been similarly instructed in the proper manner of electioneering.[21]

One of the pilots, Jim Hackworth, was a personal friend of Senff and he was indeed apparently sympathetic to Senff's representational efforts. However, there is no doubt that in this function he could only be perceived as a knowing agent of management who was privy to management's election campaign strategy. His personal friendship, if anything, added greater credence to what he represented was Respondent's intent and attitude. *Flexsteel Industries*, supra at 260.

Accordingly, I find that the pilots herein acted as responsible agents of Respondent during the election campaign and their statements of Respondent's position and their knowledge of deck hands' union sympathies and activities must be imputed to the Respondent. Barnett's agency status as a part-time pilot will be discussed below.

2. Violations of Section 8(a)(1)—confrontational coercion

I find that Respondent violated Section 8(a)(1) of the Act by the patently coercive conduct of its pilots consisting of threats of its Lemont facility closure, physical violence, job loss, benefits loss, bargaining futility and other adverse economic consequences and promises of benefits, as found above in detail and summarized below:

a. Complaint paragraphs V(f) and (r)

Jim Hackworth's postpetition/preelection threats to Senff of loss of insurance benefits, loss of free work equipment, Lemont facility closure and/or merger with a nonunion employer and consequential job loss if the Union wins, coupled with a categorical statement that Respondent would not negotiate with the Union if it were designated as bargaining agent and, also, promises of better and cheaper health insurance benefits, overtime compensation and a 9-percent pay raise if the Union were defeated violated Section 8(a)(1).

b. Complaint paragraphs V(p) and (q)

Craig Zeedyk's postpetition/preelection threat to Senff to discharge the deck hand discovered to be responsible for union organizing at Lemont, coupled with interrogation of Senff as to his knowledge of that effort, thereby rendering the interrogation coercive. Even under standards of *Rossmore House Hotel*, 269 NLRB 1176 (1984), and precedent cited by Respondent, the coupled threat and other violations take the conversation out of the category of an isolated and innocuous conversation and violate Section 8(a)(1).

Craig Zeedyk's postelection/pretrial threat to Harper to fire prounion deck hands for pretexuous reasons violated Section 8(a)(1). Although the date varies significantly from the complaint date, the issue was fully litigated.

c. Paragraphs V(n) and (o)

Dale Thomas' postpetition/preelection periodic threats to deck hand Brock that if the Union were to be elected, the Respondent would refuse to agree to any union bargaining demands and would thus force an inevitable strike; that prounion deck hands would be subjected to physical violence; that work rules would be more strictly enforced; that prounion deck hands would be discharged; the Lemont facility would be closed and later reopened as a nonunion employer which would re-employ former prounion deck hands at a lower rate of pay; but that if the Union were defeated, the deck hands would get whatever they wanted from Respondent, violated Section 8(a)(1).

d. Paragraph V(i)

Pilot Craig Nelson's February threats to Senff that Respondent was planning to contrive reasons to discharge Senff because of his union activities; that if the Union won the election, the deck hands would lose such benefits as their 401(k) savings plans, insurance benefits, travel pay and company supplied safety equipment; but that if the Union lost, the employees may receive a 9-percent raise violated Section 8(a)(1).

e. Paragraph V(c)

Pilot Al Ballard's February Main Inn interrogation of Senff as to the strength of his coworkers' support for the Union which was coupled with the following threats thereby rendering it coercive: that if the Union were designated the employees' bargaining agent, Respondent would contrive to stall negotiations, layoff the deck hands, replace them with new deck hands on the pretext of a scheduled lock closure justification; that a strike would necessarily follow; that Respondent would close its Lemont facility and merge with a nonunion entity or operate under some other subterfuge; that the deck hands' quest for union representation would be rendered futile by Respondent's obstructive tactics and that Senff better arrange for other employment; but that if the Union lost the election, the deck hands would receive some overtime compensation, and lower costs and improved health insurance, violated Section 8(a)(1).

f. Paragraph V(s)

I find that Barnett substituted for supervisory pilots with sufficient regularity during the critical preelection period to warrant a finding of his supervisory status. *Hexacomb Corp.*, 313 NLRB 983, 984 (1994); *Canonic Transportation Co*., 289 NLRB 299, 300 (1988). His regular performance as a supervisory pilot, his acceptance by deck hands as a supervisor and the clear authority of other pilots to speak on behalf of management made manifest thereafter was sufficient for deck hands to conclude that when Barnett quoted higher management and its attitude toward union supporters, he spoke authoritatively. In the absence of clear disclaimer by Respondent to the deck hands, I do not find his nonattendance at subsequent pilot meetings to have mitigated that perception. Furthermore, Barnett's statements to Brock and Senff were subsequently reinforced by other pilots as found above and literally reiterated the policy statement of Wlas himself in mid-January to Pilot Eaker. Accordingly, I find that Barnett as agent of Respondent, immediately after the filing of the petition told Senff and Brock that according to dispatcher Wlas and Manager Hudson, "heads were going to roll" because of the representation petition. I find that such a statement made to deck hands by a Respondent agent could only be interpreted by the deck hands to mean that responsible deck hands would be discharged because of their union activities, and constituted a clear violation of Section 8(a)(1).

[21] The United States Court of Appeals for the District of Columbia subsequently upheld the Board's findings but remanded the case to the Board for reconsideration of the requested remedial order. 1995 U.S. App. Lexis 3203 D.C. Cir. February 7, 1995.

g. Paragraphs V(g), (h)—impressions of surveillance

The allegations of surveillance impressions are founded on the testimony of Brock and Bradley related to conversations with pilot Jim Hackworth. In late February and early March, prior to the election, Hackworth told Brock that Respondent's attorney, Owner Arnold and Manager Hudson had identified Brock, Senff, and Bradley as union ringleaders. By that time Senff and Bradley had become open union advocates. Brock himself, having testified on behalf of the union, assumed that that Respondent considered him to be a union advocate. However, Hackworth went on to explain to Brock that at the pilot meetings, the attorney, Hudson and attending pilots reviewed lists of deck hands' names which were identified by pilots as to their union sympathy, antipathy or indifference and who were ringleaders. After the election in mid-March, Hackworth described that same preelection identification process to Bradley.

The Board has held that conduct of an employer which reasonably tends to lead employees to believe that their protected activities are under surveillance constitutes unlawful coercion. *Waste Stream Management*, 315 NLRB 1099, 1124 (1994).

I conclude that employees being told of the pilot identification process, in the absence of some qualifying explanation, would reasonably tend to believe that pilots were being ordered to engage in surveillance of their union activities and discussions and were not merely being solicited by higher management for their unfounded speculation, nor were they merely asked to report volunteered information. Accordingly, I agree that the two incidents both violated Section 8(a)(1) of the Act. Compare *Flexsteel Industries*, supra at 257; *Medlin Realty Corp.*, 307 NLRB 497, 502–503 (1992); *United Charter Service, Inc.*, 306 NLRB 150–151 (1992); *Electri-Flex*, 228 NLRB 847, 864 (1973) (regarding references to similar lists of employees' names).

3. The implementation of a written warning system

As found above, the implementation of a written warning system was instituted by Manager Hudson, solely in reaction to the filing of a representation petition. I agree with the General Counsel that institution of a written warning system in a preelection period, in the absence of any proffered legitimate business reason, constitutes a violation of Section 8(a)(1) and (3) of the Act as it constitutes manifest punishment to all employees for the activities of prounion employees and thus discourages union support. *Sahara Datsun*, 278 NLRB 1044, 1053 (1986), enfd. 811 F.2d 1317 (9th Cir. 1987). *Electri-Flex*, supra at 847–848. I disagree with Respondent that this new practice constituted merely a better recordkeeping system, i.e., that of documentation. The Respondent's prepetition disciplinary system as it was actually practiced was not progressive, but was rather a loose, subjective, erratic practice of selective verbal warnings, comments, or supervisory complaints. Respondent admittedly exercised extreme leniency because of the dearth of good deck hands that could replace those that it might have desired to suspend or discharge. The newly instituted system not only documented misconduct, but it laid a formal progressive path to future discharge based on now documented warnings. The past system had no such progression. Indeed, certain deck hands, like Senff, were warned innumerable times about tardiness, but no discharge took place for his other misconduct until Hudson reached the subjective point of just being tired of further toleration. Compare, also, Vaughn's condoned misconduct. The credible evidence reveals that there were no instances when an employee was warned verbally that the next infraction meant discharge and he was permanently discharged thereafter. I agree that those written warnings, being a consequence of a discriminatorily initiated discipline system, constituted violations of Section 8(a)(1) and (3) of the Act. There is no evidence of disparate application after January 1995, and thus I cannot find a violation because of Grossman's specific union activities. Senff's and Bradley's warnings, suspensions, and discharges as a consequence of an unlawfully implemented discipline system will be discussed below.

4. The discriminatory discipline and discharges of Senff and Bradley

I conclude that the conduct for which Senff and Bradley received written warnings were of the nature that any reasonable employer would find objectionable and would warrant some form of discipline. In fact, Senff had been previously verbally warned of his attendance and tardiness record. The secret tape recording of one's employer would reasonably be expected to arouse some admonishment regardless of the history of leniency. I am unable to find that the fact of warning Senff and Bradley was discriminatorily motivated. Nor am I able to find that the form of warning in writing with promise of more severe discipline on further misconduct was disparately applied. Thus I am not able to find that they, like Grossman, received warnings because of their acknowledged union activities. However, I find that, like Vaughn and Grossman, they received written warnings that were committed to a progression of future punishment as a consequence of the unlawfully motivated, new written disciplinary system.

With respect to the misconduct of Senff and Bradley which precipitated their suspension and discharge, again I find that any reasonable employer would find it objectionable and would be expected to react with some form of discipline. The question here is did the Respondent suspend and discharge them because of the misconduct or because of protected activities. This presents a very difficult factual issue. The two discriminatees at least superficially appeared to have taken upon a course of conduct headed for self-destruction—Senff, by virtue of his premeditated tardiness, and Bradley, by virtue of his manipulative tactics and rash conduct during and after the election campaign. They arouse very little sympathy. However, did they self-destruct under objective causation, albeit to the hope and expectation of Respondent, or was their destruction, i.e., employment termination, a condition superimposed in place of otherwise lesser punishment, if not toleration?

The General Counsel has adduced abundant evidence of knowledge of and hostility toward Senff's and Bradley's union activities. Their termination swiftly followed the election. Respondent had previously maintained an extremely erratically lenient and fuzzily interpreted disciplinary practice. Senff had been warned by Respondent's agents that his job was in jeopardy because of his union activities. Moreover, Bradley had even been told by the dispatcher that he was being suspended because of his union activities. The General Counsel has thus adduced a strong case upon which to infer that antiunion motivation determined the nature of the discipline, i.e., suspension and discharge. Respondent, of course, relies upon the aforementioned misconduct. Clearly, an employer, even a tolerant one, is not expected to forever suffer the provocative misconduct of employees who had once engaged in protected activities.

The Board has determined the evidentiary burden of proof in discriminatory motivation cases to be as explicated in *Wright Line,* 251 NLRB 1083 (1980), as approved by the Supreme Court in *Transportation Maintenance Corp.*, 462 U.S. 393, 403–404 (1983). In that case, the Board held that, henceforth, in all mixed motivation cases, it placed the burden upon the General Counsel to come forward with evidence that sufficiently demonstrated that the Respondent was, at least in part, discriminatorily motivated. If the General Counsel meets that burden, the Board held that the Respondent must thereupon assume the burden of proving that regardless of unlawful motivation, it would have necessarily engaged in the same decisional conduct because of other unlawful nondiscriminatory reasons. It is, of course, insufficient merely to demonstrate that discharge justification existed. It must be proven that it would have necessarily acted with discharge regardless of other unlawful motivation. Because of the strong evidence of animus, intent to discriminate and its historical leniency, the Respondent herein faces a formidable task. Compare: *Alterman Transport Lines,* 308 NLRB 1282 (1992). I conclude that the Respondent has failed to sustain a *Wright Line* burden despite the abundant evidence of misconduct. Initially, I find that the discriminatees were suspended, particularly Senff, pursuant to an unlawfully implemented, progressively determined, future discipline written warning system. That alone would justify a finding of unlawful suspension and discharge. However, alternatively, I find that Respondent failed to produce any compelling evidence that it would necessarily have discharged Senff and Bradley, even in the absence of partial unlawful motivation. Not only has the Respondent failed to demonstrate that it had acted pursuant to its past practice, but rather the General Counsel has proven that it had abandoned its past tolerance level for desperately needed good deck hands without a concurrent immediate business reason for doing it. Both Bradley and Senff were considered "very good" deck hands. Senff's poor attendance was long condoned. There is testimonial evidence that some unidentified deck hands of an unspecified number were discharged for their attendance record. However, the circumstances are unknown. It is unknown whether other misconduct occurred. It is unknown whether they were as experienced and as qualified deck hands as Senff and Bradley. Hudson's past tolerance level appeared to be premised on some subjective, indeterminate criteria, if "criteria" is the proper word here. The tolerance level for on-duty intoxication varied. A knife-wielding, crazed deck hand was permitted to finish his tour of duty whereas Bradley was thrown off the property with police escort despite the absence of any need for such precaution and no reasonable cause to expect vandalism by Bradley.

With respect to Senff, Respondent has failed to show that under its preunion activity criteria, Senff would have been discharged because Hudson necessarily would have become "tired of it." Reliance on the unlawfully implemented prior warning is no exculpation. There was no evidence of pre-union activity disciplinary progression. Even if there were, it had clearly not been applied to Senff.

With respect to Bradley, Barnett did not even take the spill threat to be serious enough to report to anyone until Couch joined the scene and urged him to report it, not to Bradley's pilot (Thomas) but to Hudson or to dispatcher Hackworth. Barnett and Guilliams were so doubtful that they even debated it. It was Couch who initiated action, but Couch had not even witnessed the incident. Hackworth, who also did not observe Bradley's demeanor, was the one who decided to disrupt the schedule to recall the boat and to remove Bradley from it, thus causing about 45–50 minutes of lost time, not to mention the inexplicable delay of the other boats which awaited Bradley's return.[22] Even Bradley's own pilot, Thomas, resisted Hackworth's instruction until he was categorically ordered to do so. Thomas protested to Hackworth that Bradley was a "very good deck hand," a consideration that apparently caused Hackworth to countermand a pilot's discharge of Senff prior to his union activities. Hackworth did not relent despite Bradley's explanation on the cellular telephone to him that he was not serious and had only been joking. Indeed, it is difficult to understand why Hackworth really thought that such a threat was serious, particularly in view of the undisputed hazardous nature of the Crawford Station site, as complained of by Bradley, and Thomas' description to Brock of how easy it would be to arrange the crushing between the boat and dock of a prounion deck hand who had been thrown overboard by contrived accident. Clearly, Thomas did not take the threat to be anything more than an idle gesture of defiance. Similarly, it is difficult to understand why Hudson had taken Bradley so seriously, having been exposed to Bradley's past boasts of swinging the election and his aborted tape recording attempt, after which he was reduced to a tearful state of remorse. Bradley had established himself as having a tendency to rash, ill-considered remarks and conduct which he did not follow through in execution.

Under the facts found in the foregoing state of the record, I must find that Respondent did not sustain its *Wright Line* burden of proof. Accordingly, I find Respondent suspended and discharged Senff and Bradley because of their protected union activities as alleged in the complaint.

IV. ELECTION OBJECTIONS

Objection 1 regarding threats of reprisals and promises of benefits coincides with identical, substantial 8(a)(1) violations during the preelection period, found above, in a relatively small bargaining unit and accordingly constituted conduct which necessarily tended to interfere with the employees' ability to exercise free choice in the election. *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962); *Allied Stores Corp.*, 308 NLRB 184, 186 (1992).

There is insufficient competent evidence to support Objections 2 and 3. I find that Respondent was entitled to coerce its supervisors, including Eaker, to support its position in the election. I find nothing in the discharge of Eaker that would constitute election interference. There is no evidence that Eaker's discharge was motivated by his refusal to engage in unfair labor practices. Accordingly, I find Objections 1–4 to be without merit.

V. THE REQUESTED BARGAINING ORDER

The General Counsel argues that it is "impossible to hold a free and fair election in the coercive atmosphere created by Respondent's action" which it characterizes "pervasive and egregious unfair labor practices," citing *Gissel Packing, Inc.*, supra at 613–615. The General Counsel further describes those unfair labor practices as "numerous, pervasive and serious violations of the Act" and "hallmark violations" directed at a "unit of only 25 deckhands." The General Counsel argues that there

[22] With respect to the tardiness of deck hands, which sometimes delayed a boat's departure, that delay was characterized by Respondent as reprehensible.

is no reasonable assurance against recidivism and that "it is inconceivable that the lingering effects of Respondent's conduct will be dissipated by traditional remedies such as a cease-and-desist Order."

The Respondent advances multiple reasons why the Board should apply its traditional remedies rather than a bargaining order which, it points out, the United States Court of Appeals for the Seventh Circuit, has characterized as the lesser favored remedy "due to their drastic consequences of forcing union representation on employees and forcing the employer to bargain." The Respondent argues, inter alia, that a bargaining order is inappropriate because all the confrontational allegations involve only low-level supervisors; the coercion was negated by Manager Hudson by verbal statements and written campaign literature; the percentage of victims is small; there is little evidence of actual dissemination which, because of the isolation of individual boats, is unlikely; and because of the campaign misconduct of Bradley and the turnover of deck hands.

With respect to the last factor, turnover, the Board has traditionally found it to be irrelevant to the issue of whether a *Gissel* type bargaining order is appropriate. *Highland Plastics,* 256 NLRB 146, 147 (1981).[23] In so doing, the Board expressed its concern that the lingering effects of serious unfair labor practices would make the likelihood of a free, uncoerced election improbably remote. Furthermore, the Board committed itself to the concept of practice that a wrongdoer ought not profit by the delay inherent in the administrative process by relying upon a continuing turnover. *Highland Plastics,* supra. The Board has thereafter followed those principles, often noting, however, that even if it were to consider turnover, it would oblige bargaining orders where numerous "hallmark" violations, e.g., of threats of discharge and job loss, were committed and, explicitly or implicitly, sanctioned by the highest managerial level of the employer whose continuation in their authoritative positions would likely exert a coercive effect upon unit employees. *International Door*, 303 NLRB 582, 583 (1991); *Harper Collins Publishers, Inc.*, 317 NLRB 168 (1995); *Be-Lo Stores*, 318 NLRB 1 (1995).

Some reviewing authority do not agree entirely with the Board's view and tend to place greater emphasis upon the representation rights of employees and also require the Board to explicitly set forth an explanation why traditional remedies are not sufficient. *Somerset Welding & Steel, Inc. v. NLRB*, 987 F.2d 77, 781–782 (D.C. Cir. 1993); *Avecor, Inc. v. NLRB*, 931 F.2d 924, 936–938 (D.C. Cir. 1991), cert. denied 112 S.Ct. 912 (1992); *Impact Industries v. NLRB*, 847 F.2d 379 (7th Cir. 1988); *Montgomery Ward & Co. v. NLRB*, 904 F.2d 1156 (7th Cir. 1990).

I must be guided by Board precedent. In any event, the facts herein do not show the same extent of turnover as that which concerned the reviewing Courts alone, nor do they show any turnover in the offending pilots. However, unlike such cases as *International Door*, supra, the confrontational coercion was limited to the lowest supervisory level, i.e., pilot. Of course, the dispatcher and manager were involved in the suspensions and discharge. The confrontational coercion was perpetrated by five pilots in the context of assurances against reprisal by higher management in word and in literature. Most of the coercion was directed at Senff and Bradley. Next came Brock and very little involved Harper. Bradley, Senff, and Brock were openly aggressive in their union advocacy and continued so. There is undisputed evidence that even after having been threatened by Thomas, Brock attempted to negotiate a private deal with Hudson and, moreover, felt secure enough to complain to Hudson about those threats and thereafter he received assurances of job security from Hudson. Moreover, Brock conceded that Thomas' personal dislike and harassment of him preceded his union activities. Bradley felt secure enough that he threatened to blackmail pledge card signers into continued union support, sought to work out a private deal with Hudson to swing the vote against the Union for personal gain, secretly tape recorded Hudson and everyone else, and flippantly threatened to fake an injury because he was assigned an arduous work task. Senff, of course, felt so secure that he brazenly persisted in tardiness. That such staunchly public union advocates could so openly flirt with disaster despite their victimization would certainly tend to diminish the coercion's impact even if it had been disseminated to the deck hands assigned to other boats; many of whom testified to no awareness of it.

It is my conclusion that if the Board were to order backpay and reinstatement of Senff and Bradley despite their misconduct, Respondent's employees would receive the strongest assurances that they could exercise free choice in another election without fear of repeated coercion. Indeed, backpay and offers of reinstatement of these particular discriminatees would be one of the greatest campaign tools available to the Union, even if reinstatement were to be declined by them.

The Board does not always nor automatically impose *Gissel* bargaining remedies where serious coercion and even Hallmark violations occur by low level supervision because of the nature and limited extent of victimization, the lack of dissemination of misconduct and counterbalancing assurances by higher management.[24] It is my recommendation that because of the limitation of the confrontational coercion to low level supervisors, the limitation of the impact to the particular victims involved and because of the close issue involved in the discrimination issue which involved significant provocative misconduct by the discriminatees, that the Board exercise its discretion and find that its traditional remedies are likely to attain a fair and uncoerced second election. Accordingly, I find that the 8(a)(1) violations are without merit and recommend that the Board remand the representation case to the Regional Director to reopen Case 13–RC–19061 for the purpose of conducting a second election.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has engaged in unfair labor practices as found in the above "Analysis" section of this decision, which unfair labor practices affect commerce within the meaning of the Act.

[23] Of 61 deck hands hired between February 1, 1994, and April 30, 1995, 36 had terminated their employment. Of the 22 deck hands eligible to vote, only 13 remain employed as of the date of the trial. See also the turnover of card signers noted above, i.e., 4 gone by the election date and 2 more by the date of trial, excluding Senff and Bradley.

[24] See *L. M. Berry & Co.*, 266 NLRB 47 (1983); *Walter Garson, Jr. & Associates*, 276 NLRB 1226 (1985); *Phillips Industries,* 295 NLRB 117 (1989); *Valley Community Services*, 314 NLRB 903, 904 (1994); *Correla Electric*, 317 NLRB 147 (1995).

4. The challenged ballots cast in the election conducted in Case 13–RC–19061 are nondeterminative.

5. The Respondent has engaged in conduct which has interfered with the free choice of employees in the Board-conducted election in Case 13–RC–19061 but not conduct which would render unlikely a free and fair second election by virtue of the Board's traditional remedies.

6. Respondent has engaged in no other unfair labor practices other than those alleged in the complaint and found meritorious in this decision.

7. Objections to Elections 2, 3, and 4 are without merit.

THE REMEDY

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.

Having found that the Respondent, in January 1995, instituted an unlawful discriminatory, progressive, written disciplinary warning practice for all employees in retaliation for the union activities of some of its employees, it is recommended that it abrogate that practice, reinstate its preexisting verbal warning practice and expunge from its records all warnings issued thereunder to all employees, including those to employees William Vaughn, Jeff Grossman, Steven Bradley, and Karl Senff.

Having found that Respondent unlawfully suspended and thereafter discharged Steven Bradley and Karl Senff, I recommend that Respondent be ordered to offer them immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority and other rights and privileges, and to make them whole for any loss of earnings suffered as a result of its unlawful conduct by payment of a sum equal to that which they would have earned absent the discrimination against them, with backpay and interest computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]